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A

TREATISE

OF THE

LAW OF PROPERTY

ARISING FROM THE RELATION

BETWEEN

Husband and Wife.

BY R. S. DONNISON ROPER,

OF GRAY'S INN, ESQ., BARRISTER AT LAW.

VOLUME THE SECOND,

CONTAINING

CHAP. 13. WIFE'S INTEREST IN HER HUSBAND'S PERSONAL ESTATE.

14. HUSBAND'S COVENANTS TO LEAVE HIS WIFE PERSONAL ESTATE, AND HER TITLE AS NEXT OF KIN.

15. EFFECT OF MARRIAGE ON PRIOR ACTS AND AGREEMENTS OF HUSBAND AND WIFE.

16. DISABILITIES OF COVERTURE, AND EXCEPTIONS TO THEM.

17. GIFTS AND ALLOWANCES BY HUSBAND TO WIFE.

CHAP. 18, 19. WIFE'S POWER OVER HER SEPARATE ESTATE.

20. EFFECTS OF WIFE'S VOLUNTARY GIFTS AND APPOINTMENTS OF HER SEPARATE ESTATE.

21. RESTRAINT OF WIFE'S POWER OF DISPOSING BY ANTICIPATION, AND THE RIGHTS OF HER CREDITORS TO HER SEPARATE ESTATE.

22. SEPARATION BETWEEN HUSBAND AND WIFE.

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HUSBAND AND WIFE.

CHAPTER XIII.

THE WIFE'S INTEREST IN HER HUSBAND'S PERSONAL ESTATE.

THE subjects intended to be treated upon in this chapter, are

I. *The wife's interests in her husband's personal estate under the statute of distribution, and under the customs of the cities of London and York.*

II. *What will be a bar to such her interests.*

Wife's interest under the statute of distribution.

I. With respect to the wife's interest in her husband's personal estate under the statute of distribution, if she survive her husband, who happens to die intestate, leaving children, and without having made any settlement upon the marriage to the pre-

WIFE'S RIGHTS UNDER THE CUSTOMS OF LONDON AND YORK, AND STATUTE OF DISTRIBUTION.

judice of her right, she will be intitled by the statute (*a*) to one-third part of his personal estate; and if there be no child, then to a moiety.

But this interest of the wife, as also her interests by the customs after mentioned, are under the absolute power and control of her husband; for if he make a will disposing of his personal estate, she cannot claim any part of it in opposition to that disposition.

Such is the widow's title under the statute of distribution; but her share in her husband's personal estate may be augmented by particular customs, which we will next consider.

According to the customs of the city of *London* and the province of *York* (which in regard to the widow are nearly the same), if a freeman, having a wife and children, die intestate, possessed of personal estate more than sufficient to pay his debts and funeral expenses, his residuary estate will be distributable under the statute and the customs, in the following manner; after deducting the furniture of the widow's bed-chamber, and apparel, called the *widow's chamber*, and to which she is intitled, or the sum of £50 in lieu of it if her husband's estate exceed in value the sum of £2000 (*b*), the property is to be divided into three shares; one of which belongs to the widow, another to the children, and the third to the intestate's administrator, which is called the *dead man's share;* and by statute 1 James II., chapter 17, that share is made distributable according to the statute of distribution; so that of this

Widow's chamber.

Distribution

(*a*) 22 and 23 Cha. II. chap. 10, made perpetual by 1 James II. chap. 17, sect. 5. (*b*) Biddle v. Biddle, 7 Vin. Abr. 201.

third the widow is intitled to one third, and the children to the remaining two-thirds: if, then, the intestate's residuary personal estate amount to £1800, and he leave a widow and two children, the division will be into eighteen parts; of which the widow will be intitled to eight, six by the custom, and two by the statute; and each of the children will be intitled to five, three by the custom, and two by the statute. But suppose the father to have left a widow and only one child, still she will be intitled to eight shares, and the child to ten, six by the custom, and four by the statute; and if there were no child, then the widow would be intitled to three-fourths of the whole, two by the custom, and one by the statute; the remaining fourth being distributable, under the statute, among the intestate's next of kin (*a*).

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where there is a widow and two children, or one child only.

It has been observed that a freeman may exclude the customs and the statute by making a will disposing of his personal estate; but it sometimes happens, that a freeman engages before his marriage that his personal estate shall go at his death according to the custom, which is a good and binding agreement. In such cases, two-thirds of his residuary personal estate will be distributable according to the custom, notwithstanding his will; but the remaining third, or dead man's share, will pass by it (*b*).

Effect of freeman's agreement that at his death his personal estate shall be distributed according to the custom.

Since the interest of the widow of a freeman of *London* or *York*, in her husband's personal estate, is materially concerned in questions when these customs attach, and when the children are, or are not, wholly or in part excluded from taking under

(*a*) 2 Black. Com. 518. 2 Salk. 426. (*b*) 2 Vern. 111.

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them, it is necessary briefly to consider these subjects.

1. There must be an intestacy to enable the customs and the statute of distribution to affect the personal estates of freemen and other persons.

As to the customs and the statute attaching upon property, to be administered under an *equitable* intestacy.

But it may happen that a freeman or other person may make a will appointing an executor, and yet die intestate in equity, which occurs when either he makes no disposition of his residuary property, or having made such, the residuary legatee dies before him, and the executor is not allowed to take it beneficially under his *legal* title, but is declared a trustee for the testator's next of kin. Different opinions prevail upon the point, whether the residue is to be distributed according to the customs and the statute; which is of great importance to the widow in regard to the extent of her interest in her husband's personal estate. It is the opinion of some persons that the customs and the statute are only applicable where there is a *legal* or *actual* intestacy, i. e. where there is not a complete will by the appointment of an executor; whilst other persons are of opinion that there is no difference between legal and equitable intestacy, as to the operations of the customs and the statute. There are few decisions upon the subject, but the weight of authority preponderates against the opinions that equitable intestacies are within the customs and the statute, except so far within the statute as Courts of Equity have referred to it in order to fix the proportions which the next of kin should take in the equitable residue. The principle appears to be this; that where a freeman makes a will, and appoints an executor, the whole personal estate vests in him, and

nothing is left for the customs to operate upon; and that although in the division of the property, a Court of Equity acts by reference to the statute of distribution, yet that it does not so act upon the ground that the case is within it, but only as a proper standard to fix the shares of the next of kin.

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We shall now consider the decisions.

In *Beard* v. *Beard* (*a*), *A*, a freeman of *London*, being at variance with *B*, his wife, devised all his real and personal estates to his brother *C*, and appointed him *executor*. *A*, by deed poll, afterwards gave and granted to *B all his substance* which he then had, or might thereafter have. *C* obtained probate of the will, and *B*, claiming under the deed, sought relief in equity, insisting that such deed was a revocation of the will. *Lord Hardwicke* held the will to be revoked by the deed, although *B* could take nothing under such deed, because a wife could not take by immediate grant or conveyance from her husband (*b*). His Lordship also determined that the executor was a trustee for the next of kin, and he ordered the residue to be distributed according to the custom of the city of *London*, expressing an opinion that there was no difference in law between an *absolute* and a *qualified* intestacy.

Although *Lord Hardwicke* is reported to have expressed himself to the above effect, yet the case itself appears in fact to be one of actual intestacy: the will was revoked *in toto*, and it is probable that probate was granted by the Ecclesiastical Court in ignorance of the total revocation of the will by the

(*a*) 3 Atk. 72. (*b*) See vol. 1. p. 53.

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deed; for it cannot be presumed that the Court would have issued probate of a revoked instrument, if that circumstance had come to their knowledge.

The last case was followed by that of *Lawson* v. *Lawson*, before *Lord Bathurst*, in which the question was, who was intitled to the residue of a testator's personal estate, under the following circumstances.

A having his domicil, and being resident within the province of *York*, made his will; and after disposing of his real estates, bequeathed to his widow a debt of £300, and appointed her executrix. *A* made no disposition of the residue of his personal estate, and died without children, leaving his widow, and a nephew and niece his next of kin. Two questions arose in the cause; first, whether the legacy prevented the widow from taking the residue beneficially, as executrix; and secondly, if that were so, then whether such residue was to be distributed according to the custom of the province. These questions were decided by *Lord Bathurst*, who by his first decree, in March 1772 (*a*), declared that the widow was to be considered a trustee of the testator's residuary personal estate beyond the £300 debt specifically bequeathed to her, and that such residue was to be divided according to the custom of the province of *York*, by which she was intitled to one moiety of the residue, and also to a half of the remaining moiety; and that the other half of such remaining moiety belonged to the plaintiffs (the next of kin), &c. This decree being unsatisfactory to the next of kin, the cause was reheard by his Lord-

(*a*) Reg. Lib. 1771, B. fo. 224 *b*, and 225 *b*.

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ship, and the case was fully argued before him, when he varied his decree so far as it related to the distribution of the estate under the custom, and declared (*a*) that the residue was to be divided according to the statute of distribution, by which the widow was intitled to one moiety, and the next of kin to the other. The widow appealed from this decree to the House of Lords, and it was reversed, the Court declaring that the widow was intitled to the whole of the residue as executrix (*b*); so that the opinion of *Lord Bathurst* upon the distribution in the case of intestacy was not impeached by the order of reversal, but it remains an authority, established upon debate and full consideration, against what *Lord Hardwicke* is reported to have said in the case of *Beard* v. *Beard*, before stated. The decision of *Lord Bathurst* is supported by the opinion of *Sir William Grant*, late Master of the Rolls (who was not in the habit of expressing opinions without due consideration) in a case of *Walton* v. *Walton*; and since his opinion coincides with that which I have formed on this question, I shall conclude the subject in his Honor's own words; "I conceive that the provision in the statute of distribution applies only to cases of *actual* intestacy; and where there is an executor, and consequently a complete will, although the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them: therefore a child advanced by its father, in his life, cannot be called upon to bring her share into hotchpot (*c*)."

(*a*) Reg. Lib. 1775, B. fol. 337 *b*. (*b*) 4 Bro. Parl. Ca. 21. 8vo. edit. (*c*) 14 Ves. 324.

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It seems essential to the attaching of the custom of the city of *York*, that a freeman should have his fixed or general residence within the province at the period of his death (*a*).

But this is not so required by the custom of the city of *London*; for that custom follows the person of the freeman, and operates whether he never resided in the city, or having lived there, quitted it, and became domiciled in the country.

Thus in *Rutter* v. *Rutter* (*b*), a freeman of *London* left the town, and lived in the country for twenty years, and married: his wife being the survivor, filed a bill for her share of his personal estate, according to the custom, and the defendant pleaded the husband's leaving the city, and his residence in the country, but the plea was disallowed.

Custom of York gives place to that of London,

If the two customs come in competition (as where a resident freeman of *York* is also a freeman of the city of *London*), the custom of *London* will prevail and control that of *York* (*c*); so that the distribution must be made according to the rules of the custom of the city of *London*.

and does not extend to diocese of Chester.

But it must be remarked that the custom of the province of *York* does not extend to the diocese of *Chester*; upon this subject *Lord Alvanley* thus expressed himself in the case of *Pickering* v. *Lord Stamford* (*d*); "A vulgar error prevailed that the custom of *York* goes through the whole province; the legislature themselves fell into such error, by reserving to the citizens of *York* and *Chester* the customs of those cities; the latter of which has no

(*a*) Swinb. 214. (*b*) 1 Vern. 180. (*c*) Chomley v. Chomley, 2 Vern. 48—82 (*d*) 3 Ves. 338.

custom. When by another act they repealed that as to the city of *York*, they left *Chester* just as it was by the first act. That custom of *York* never attached upon any part of the province which was not so at the time of Henry VIII., and *Chester* was annexed since that period."

WIFE'S RIGHTS UNDER THE CUSTOMS OF LONDON AND YORK, AND STATUTE OF DISTRIBUTION.

Property.

With respect to property falling within the operation of the customs; it seems that they will extend to all the freeman's personal estate, wherever it may be (*a*).

Customs do not operate if there be neither widow nor child.

But in order to enable the customs to attach, the freeman must have left a widow or children; for if he die without either, his personal estate will be distributable amongst his (the intestate's) next of kin, under the statute of distribution (*b*).

Customs extend not to grandchildren.

The customs do not extend to grandchildren; so that if there be neither widow nor children, but grandchildren, the intestate's property will be also distributable under the statute (*c*).

Advancements by freeman to his children, and the effect as to widow's share.

When there are children, and they have been partially advanced by their father during his life, they must bring their advancements into *hotchpot;* but if they have been fully advanced, then the customs will have been satisfied, and the intestate will be considered in the same view as if he had left no children: in that event the widow will be intitled to three-fourths of the whole of the intestate's personal estate; but a distinction must be observed between the circumstance, when there is but one child and the widow; for in that case, if the child be not fully advanced, the custom will not be satisfied, and the

(*a*) See Toll. Ex. 402. (*b*) 4 Burn's Eccl. Law, 473. 2 Show. 175. (*c*) Fowke v. Hunt, 1 Vern. 397.

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child will not be obliged to bring the partial advancement into hotchpot; because the custom only requires such partial advancement to be brought in when there are other children, in order to make an equality amongst them, and not for the benefit of the mother, or to increase the dead man's part (*a*).

Advancements.

The advancements must appear under the freeman's hand.

It seems that certainty in relation to the thing advanced, and not to its value (*b*), is necessary to appear under the *father's hand*, in order to induce a Court of Equity to direct an inquiry whether such advancement is or is not equivalent to the child's orphanage share (*c*); and if upon such inquiry it happen that the advancement is of less amount than that share, the deficiency will be made good out of the estate liable to the custom; but if the amount of the advancement do not appear under the father's hand, it is to be considered a full advancement (*d*).

As to bringing into hotchpot when advancements exceed orphanage shares.

Suppose, then, an advancement to exceed the orphanage part, opinions are at variance whether the child will be permitted to take under the statute of distribution, a share of the dead man's part, until it bring into hotchpot the advanced excess. The argument for the child's retaining the excess, and also having its share under the statute, is founded upon a supposed purchase by the father, of the child's orphanage share, so as to take it out of the custom, and make it a part of his estate, distributable under the statute; but unless such be the *express* agree-

(*a*) Cleaver v. Spurling, 2 P. Will. 527. Stanton v. Platt, 2 Vern. 754. (*b*) 1 P. Will. 647. (*c*) Fawkner v. Watts, 1 Atk. 408. 2 Salk. 426. Dean v. Dalaware, 2 Vern. 630. Northey v. Strange, 1 P. Will. 342. City's certificate, stated 1 P. Will. 643, ed. by Cox. 3 Atk. 527 (*d*) Cleaver v. Spurling, 2 P. Will. 527.

ment between them (*a*), this reasoning does not appear to be applicable, since the thing given may be considered a gift or advancement, as well as a consideration for such purchase. When, however, there is this express agreement between the parties, then, whether the child be benefited or not, it will be bound by the contract; but that this is not the case in the absence of such agreement, when the advancement is less than the orphanage share, appears from the cases before referred to. It is presumed, therefore, that since in the event of the advancement being less than the full orphanage part, the child is intitled to have the deficiency made good, so on the other hand, equality of justice requires that the child should bring in the excess of advancement before he be intitled to share in the part distributable under the statute; and the more especially, since the statute (with the exception of the heir, as to advancement, or settlement upon him of freehold estates), provides and declares, with a view to equality among the children, that children advanced by their father in his lifetime, with lands or personalty, shall bring them into hotchpot before they shall take any shares in his personal estate (*b*). With respect to authorities which may be considered as contradictory to the above observations, it is to be observed, that the decree in *Gudgeon* v. *Ramsden* (*c*) was not acquiesced in, and upon a rehearing, the suit was compromised; and it may be inferred from the report in *Hearne* v. *Barber* (*d*), that the advancement exceeded the child's distributive share in the

(*a*) Medcalfe v. Ives, 1 Atk. 63. (*b*) See Edwards v. Freeman, 2 P. Will. 435. (*c*) 2 Vern. 274, ed. by Raithby. (*d*) 3 Atk. 213.

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dead man's part under the statute, and it appears that *Lord Hardwicke* entertained a *doubt* whether the child should not bring its advancement into hotchpot before it could take under the statute; his decree, however, was in opposition to such doubt, but it seems to have been pronounced through compassion, or what was considered to be the particular hardship of that case.

Advancements.

What are considered to be advancements.

As to what shall be considered an advancement. It must be made in consideration of marriage, or for the promotion of the child in the world; as of money advanced at or in pursuance of marriage (*a*), or be money laid out in purchasing for the child a commission in the army, and the like (*b*).

The heir.

The *heir* in respect of advancements of *personal* property is in the same situation as other children in regard to bringing them into hotchpot (*c*); but *money* laid out by the intestate in improvements or repairs of real estate which he did not absolutely part with in his lifetime to the heir, but permitted to descend to him, is not an advancement to be brought into hotchpot under the statute of distribution (*d*).

What not advancements.

With respect to such gifts as may be properly termed *presents*, as of a gold watch, or of wedding clothes (*e*); or of money for the maintenance and education of the child, which the parent is under a natural and moral obligation to supply, viz. such,

(*a*) 1 Atk. 402. Hume v. Edwards, 3 Atk. 451. Jenkins v. Holford, 1 Vern. 61. (*b*) Hearne v. Barber, 3 Atk. 213. Norton v. Norton, 3 P. Will. 317, note, ed. by *Cox*. (*c*) Phiney v. Phiney, 2 Vern. 638. (*d*) Smith v. Smith, 5 Ves. 721. (*e*) Elliot v. Collier, 3 Atk. 527.

amongst others, as money to defray a son's expenses at the university, travelling expenses, money paid with a child upon placing him or her out an apprentice as a compensation for the support of the child; such and such like payments will not be considered advancements to be brought into hotchpot either under the customs or the statute of distribution (*a*).

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Advancements.

It is presumed, indeed, that a distinction must be made when a considerable sum of money is advanced by the father with the child as a *premium* for instruction, and not merely as a compensation for maintenance, and that the former sum is in strictness liable to be brought in hotchpot. In allusion to this distinction it is conceived that *Lord Hardwicke* expressed himself in *Morris* v. *Burroughs* (*b*), "I should think (said his Lordship) that if a father should give money to put a son apprentice, or advance him in life by setting him up in trade, &c. that would have the same effect," i. e. will be a satisfaction of the custom, or must be brought into hotchpot, as the case may happen to be.

Premiums given with children.

When lands are advanced by a freeman to a child, or are permitted to descend to the heir, the following distinctions under the customs and the statute of distribution must be attended to.

As to lands being advancements under the customs and the statute.

Lands descending upon the heir from a freeman of *London*, or by him given or settled upon any of his children, or money directed to be laid out in the purchase of lands (*c*), and to be settled upon any of

Under the customs.

(*a*) Hinder v. Rose, 3 P. Will. 317, note, ed by *Cox*. (*b*) 1 Atk. 402. (*c*) Annand v. Honeywood, 1 Vern. 345. Stanton v. Platt, 2 Vern. 753.

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them, are not advancements within the custom of *London*, for it only regards the *personal* estate of freemen; yet as the custom includes chattel interests, it makes a settlement of a *term* for years an advancement within its provisions (*a*).

Advancements.

But by the custom of the province of *York* lands descending from the freeman upon his heir by the common law, or to which the heir succeeds under his father's marriage settlement, will exclude him from any filial portion under the custom (*b*), whether they be in possession or reversion, for land as well as money is an advancement within the custom. But the custom is construed strictly, and is held to apply singly to the heir at common law, and to lands only which devolve to him in that character; so that if he take them by *purchase*, as under his father's will, and not by descent, or if he inherit them as heir by Borough-English, or if the estate be copyhold, to which he succeeds as customary heir, he will in none of these instances be excluded from his filial portion (*c*).

Under the statute.

With respect to the statute of distribution, the heir may claim a distributive share of the personal estate, although he may have been advanced with lands by his father the intestate, or although real estates descended to him from his father; but lands settled by the intestate upon any other of his children must be brought into hotchpot before they will be permitted to claim distributive shares under the statute (*d*), yet lands descending upon a child not

(*a*) 2 P. Will. 274. (*b*) Constable v. Constable, 2 Vern. 375. Swinb. 215. (*c*) Swinb. 216. 4 Burn's Eccl. Law, 465. (*d*) See 22 and 23 Char. II. cap. 10, sect. 5.

heir by the common law but heir by special custom, as upon the youngest child by the custom of Borough-English (*a*), or a devise of lands to such child by its father, who dies intestate as to his personal estate, will not exclude such child from a distributive share under the statute (*b*).

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II. The next consideration is how the wife may be barred of her interests under the customs and under the statute of distribution.

When and when not barred.

With respect to the widow's chamber, she will be deprived of it if the assets of the freeman be insufficient to pay all his debts; but in analogy to the rule which prevails in regard to the wife's paraphernalia, afterwards considered, it seems that she would be intitled to stand in the places of specialty creditors, in order to be reimbursed the value out of the intestate's freehold estates; and if it should happen that the freeman died intestate as to the articles falling within the widow's chamber, it is presumed, upon the principle of the same analogy, that although they would be liable to debts in failure of the other personal estate, yet that they would not be liable to the demands of general legatees (*c*).

How wife barred of her interests under the customs and the statute.

Of widow's chamber.

By creditors.

Her equity in that case.

Preferred to legatees.

By statutes 4 and 5 William and Mary, c. 2, explained by the 2d and 3d Anne, c. 5, for the province of *York*, the 7th and 8th William III. c. 38, for *Wales*, and the 11th George I. c. 18, sect. 17, for *London*, powers of testamentary disposition are given to persons residing in those places and districts, liable to the customs prevailing there; which powers,

Widow barred by statutes enabling freemen to prevent the customs by their wills.

(*a*) Lutwyche v. Lutwyche, Forest. 276. (*b*) 2 P. Will. 440.
(*c*) 3 Atk. 369.

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When and when not barred.

when exercised, defeat such customs, and consequently the claims of widows, &c.; so that questions upon the customs can at present only arise when such persons make no wills, or who enter into engagements that their personal property shall be distributed after their deaths according to the customs. In those instances the rights and powers of the parties remain the same as before the passing of the above acts of parliament, which rights and powers it becomes therefore necessary to consider so far as the wife is concerned.

And by dispositions during the freeman's life if *bonâ fide.*

A freeman during his life may make a *bonâ fide* gift or disposition of his property amongst his children or otherwise, which will bar his widow's claims under the custom (*a*). But if the transaction be merely colourable, or be accompanied with circumstances evincing fraud, the disposition will be void against her, and her rights by the custom will attach.

Not so if made in fraud of the customs.

Thus in *Tomkyns* v. *Ladbroke* (*b*), a freeman of *London* executed a will and a deed on the same day, by the last of which he assigned £5000 to trustees for his daughter's separate use. He was then of the age of seventy-two, and in bad health, and died two days afterwards. And *Lord Hardwicke* decreed that the £5000 were parts of the freeman's personal estate, the case being of a very suspicious nature as to the custom, the deed not having been delivered out of the freeman's possession: the age and state of health of the freeman were also material considerations in the view of his Lordship, who con-

Evidences of fraud.

(*a*) 2 Vern. 277. (*b*) 2 Ves. sen. 591.

sidered that the deed was a testamentary act, and therefore in fraud of the custom.

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Other evidence of fraud upon the custom will appear upon reference to what has been before detailed in the first volume, upon the subject of fraudulent or voluntary settlements. Keeping the deed in the settlor's hand, or retaining possession of the property after the assignment, are marks of fraud (*a*); so also the confession of a voluntary judgment, &c. will be ineffectual against the widow's rights (*b*).

When and when not barred.

As retaining the deed, or possession of the property after assignment, or confession of a voluntary judgment.

In *Edmundson* v. *Cox* (*c*), the freeman left inclosed with his will a bond, dated prior to it (and which was voluntary) conditioned for the payment to his nephew of £1000, or to transfer to him £1000 *stock* in the Million Bank. And *Sir John Trevor*, M. R. determined that this bond being in the nature of a voluntary gift was fraudulent *quoad* the wife's customary share; and he said that such sort of contrivances were always set aside by the Court.

This bond carried with it a mark of fraud, and showed the intent of its execution. It was never delivered out of the obligor's possession, nor was intended so to be during his life; it was in fact an artifice to put into a nephew's pocket £1000 in contravention of the custom.

Any device to defeat the custom and preserve the income of the property to the husband for his life will be met and cancelled by the Court.

When freeman's purchases of lands are fraudulent.

Thus in *Coomes* v. *Elling* (*d*), the husband, ten years before his death, purchased a leasehold estate

(*a*) Smith v. Fellows, 2 Atk. 62. (*b*) Hall v. Hall, and Turner v. Jennings, 2 Vern. 276, 612. Fairbeard v. Bowers, 2 Vern. 202. (*c*) 7 Vin. Abr. 202, pl. 11. (*d*) 3 Atk. 676.

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for forty years in the *joint names of himself and wife*, and *Lord Hardwicke* was of opinion that the lands were to be considered part of the freeman's personal estate.

When and when not barred.

His Lordship's opinion must have been founded upon this, that the transaction was fraudulent, a contrivance of the husband to dispose of so much of his personal estate after his death as he had invested, in fraud of the custom, at the same time reserving to himself the rents and absolute dominion over the estate during his life; for by the mode in which the conveyance was taken, he retained to himself the possession and the absolute power of disposal of the estate whilst he continued to live.

When not.

But if the transaction be *bonâ fide*, then if the husband purchase or agree to purchase lands, either in his own or a trustee's name, that will be good, and no fraud upon the custom, as was decided in *Ambrose* v. *Ambrose* (*a*), where a purchase was made by a freeman in the names of two trustees; in that case, although the purchase money was mentioned in the conveyance to have been paid by one of the trustees, yet since that trustee signed a declaration of trust after the freeman's death, stating that he was only a trustee for the freeman, whose money the purchase money was, the Court held that the money was properly invested, and that the estate ought not to be considered as part of the freeman's personal estate, and therefore liable to the custom.

In *Tomkyns* v. *Ladbroke* (*b*) *Lord Hardwicke* de-

(*a*) 1 P. Will. 321. (*b*) 2 Ves. sen. 593. See also 1 P. Will. 532, and Frederick v. Frederick, 1 P. Will. 719.

clared that a freeman might in his last illness lay out his personal estate in land, and admitted that a freeman might by act during his life, and *in extremis*, give away any part of his personal estate, provided he devested himself of all property in it. It appears, nevertheless, difficult to suppose even a case where such an act can be done without contemplating a fraud upon the custom. And *Lord Hardwicke* in the case referred to seems to have been impressed with the same idea; for he said, "where there is any case of such an act by a father upon his death-bed, and no evidence of actual possession or effect of possession or enjoyment during the father's life, the consideration is, *what construction* ought to be made upon the *nature* and *intent* of the act done?" The right, however, being admitted to exist, it may, therefore, be exercised; and with respect to the *intent* of the freeman, since every disposition made by him in his lifetime of his personal fortune may be considered as done with a view to defeat the custom, *pro tanto*, and yet they are good, it is presumed that the like intent in his last illness would not be permitted to vitiate the gift or disposition then made by him. Probably the following may be considered as the right conclusion upon this subject, viz. that if the act be accompanied with delivery of the property, and every thing is done (so far as it can be, before the freeman's death intestate) to give effect to the transaction, and there is no reservation, and the freeman devests himself of all interest in the property, then the act will be necessarily valid, as a due exercise of his admitted right, whilst life remained, to dispose of his property in bar of the custom.

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Investments and gifts of personal estate by freeman when *in extremis.*

Probable rule as to their validity.

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When and when not barred by settlement.

Bar of widow's customary rights by settlement.

The widow's rights under the customs may be barred by the purchase of them by settlement previously to the marriage (*a*).

In *Medcalfe* v. *Ives* (*b*), *A* and *B* his wife before their marriage covenanted in articles of settlement in consideration of her portion of £2000, to release all the right and interest which might accrue to them out of her father's personal estate by the custom of the city of *London*. *B* was under age, and *Lord Hardwicke* decided that the husband being alive was bound to perform the covenant, observing that according to *Judd*'s law a husband is authorised to agree with the father for the wife, although she be under age. His Lordship, therefore, decreed that the husband was barred of any customary share in right of his wife, *or otherwise* in the personal estate of the father.

Not necessary to state in settlement, when made of *personal* estate, that it was in bar of widow's share under custom of London, for it will be so presumed.

It seems from the custom of the city of *London*, as certified in the case of *Lewin* v. *Lewin* (*c*), that when the provision for the wife by settlement is of *personal* estate, although nothing appears from the settlement that her customary rights were then in contemplation, yet that they will be presumed to have been so from the nature of the property settled, so that she will be precluded from claiming *part* of the *same* estate by settlement, and *another* part of that estate by the custom.

But this presumption may be repelled by the terms of the settlement.

(*a*) Hancock v. Hancock, 2 Vern. 665. Blunden v. Barker, 1 P. Will. 634. Love's case, 1 Vern. 6. (*b*) 1 Atk. 63; see also 1 P. Will. 531. (*c*) 3 P. Will. 15.

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Instances where the presumption was repelled.

Thus, in *Kirkman* v. *Kirkman* (*a*), the husband's father, in consideration of the wife's portion of £5000 being paid to him, assigned to the husband all his share in a partnership, and covenanted that he would, at his death, give or leave £5000 to the husband, to be applied as therein mentioned, and that in the event of the wife surviving her husband, then that the husband, or his surviving partners, should pay to the trustees £10,000 for the wife's use, as therein stated, with liberty for her to continue the money in the trade to the end of the partnership; and it was *declared* that nothing therein before contained, nor the provision thereby before made for the wife, out of the husband's personal estate, should be in any wise construed to bar or deprive her of her right to dower, or thirds, at common law, or by any law, *custom*, or usage whatsoever, out of all such real estate as the husband should become seised or possessed of during his life, nor to bar or deprive her taking any other gift, provision, or bequest, which he should think fit to give, leave, or make to or for her, by will, deed, gift, *or otherwise in any wise whatsoever*. The marriage afterwards took place, and the husband became a freeman of *London*, and died intestate. The questions were, whether the settlement barred the wife, who survived him, of her claims under the custom and the statute of distribution? And if not, then, whether the £10,000, or £5000, part of it, to which the wife was absolutely intitled under the settlement, were satisfied by what she took under the custom and the statute? or if not, then whether she ought not to

(*a*) 2 Bro. C.C. 95.

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bring into hotchpot one of those sums? And *Lord Thurlow* decided in favour of the wife upon all these points, observing, that it was the intention of the proviso that the covenant should not bar her from any effect of the husband's success.

When and when not barred by settlement.

But since the custom of *London* does not apply to *real* estates, when, therefore, the settlement or jointure upon the wife is made of or out of lands, it is necessary, in order to make the provision a bar to the widow's claims under the custom or the statute of distribution, that the contract or intention to do so should appear from the deed, and what has been before detailed, in relation to the husband's purchase by settlement of his wife's *choses in action* (*a*), applies to the present subject.

And when the settlement is of *lands*, widow's customary rights, or those under the statute, will not be barred except it be so expressed, &c.

In *Babington* v. *Greenwood* (*b*), *Lord Parker* clearly held, that a jointure of *land* made by a freeman of *London* upon his wife, *if expressed* to be in bar of her customary part, would have that effect; but that, *if it were not* so expressed, and only said to be in bar of her dower, that would be no bar of her customary part, because land, or a real estate, is of a quite different nature from personal estate, and a matter wholly out of the custom of *London*.

The reason why the wife shall be barred of dower only (*c*), when that right alone is mentioned in the settlement, is this; she stipulated to part with, and the husband to purchase no other interest than that expressly mentioned. Upon the same principle, if, by the deed, she purport merely to give up her rights to dower and the custom in consideration of a jointure, that provision, upon the husband's intestacy,

(*a*) *Ante*, vol. i. p. 285, *et seq.* (*b*) 1 P. Will. 530.
(*c*) Atkins v. Waterson, 1 Eq. Ca. Abr. 157. pl. 5.

will be no bar to her title to a share in the dead man's part under the statute of distribution.

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The following is an instance where the terms of the settlement excluded the wife of both her rights by the custom, and under the statute.

When and when not barred by settlement.

A, in consideration of marriage with *B*, settled lands in jointure upon her in full recompense of *dower*, and of *all demands* she might make to his personal estate by the *custom* of the province of *York or otherwise*, provided, that if she after his death claimed, or recovered any part of his personal estate, by the *custom*, or *any other means* whatsoever, the trustees were to be seised of the jointure lands, to indemnify the persons injured by the widow's claims of dower, thirds, or any part of his personal estate. *A* died intestate, and *B*, his widow, administered to him; and it was decreed, that as the intent was plain to exclude *B* wholly from the personal estate, she could not claim any part of it, and that her taking administration was in violation of the settlement (*a*).

Instance of a settlement barring widow of dower, thirds, and her customary share.

When the provision for the freeman's widow is made *after* marriage, it will be left to her option, after the death and intestacy of her husband, whether she will accept it, or her customary and distributive shares; the amounts of those shares being first ascertained, in order that she may fairly exercise her right of election, as has been before observed upon that subject (*b*). And when the freeman disposes by will of his property (as he is at liberty to do under the statutes before referred to), and he bequeaths

Widow's election.

(*a*) Benson v. Bellasis, 1 Vern. 15. (*b*) Vol. i. p. 582.

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part of it to his widow, already provided for out of real estate, by settlement; whether the wife will or will not be put to her election between her provision and the benefits under the will, depends upon the terms of the will, and the intention of the testator; and the question must be decided according to those general principles that govern other similar cases, and which are collected under the title "Election," in the "Law of Legacies (*a*)".

When and when not barred by settlement or will.

But there is one particularity which must be noticed, viz. that in the instance of the widow's title under the statute of distribution, whether the husband die intestate, or dispose of his *personal* estate by will, which fails by lapse, if the wife be barred of her distributive share by *settlement* before marriage, she will be equally excluded in favour of the next of kin as of the particular legatee. This, however, is not the case when the husband by *will* makes provision for his wife, stating it to be in lieu and bar of all her claims upon his personal estate, and then disposes of his personalty, and such disposition lapses, or is void, so that the fund becomes the property of his next of kin; the bar created by the will, in favour of the legatee, will not be considered as extending to the next of kin, therefore, notwithstanding the expressions in the will, the widow will be intitled to a share under the statute of distribution. The principle of the distinction is this, that where a woman has agreed before marriage to accept a consideration for her widow's

Distinction to be noticed when widow is barred under a *settlement* before marriage, and when the provision in bar is by the freeman's *will.*

(*a*) 2 Vol. pp. 404, 454, 459, 460, 463, 2 Ed. See also, *ante*, vol. I. chap. xi. p. 555, *et seq.*

share, she is bound by her contract whether her husband die testate or intestate, but where there is no such contract, but the provision in bar of the distributive share arises upon the freeman's will, it is presumed that the motive for the widow's exclusion originated in a *particular* design or purpose of the testator, viz. for the benefit of the person in favour of whom the property was bequeathed by him, so that if the purpose be disappointed there is no reason why the bar or exclusion should continue. *Lord Alvanley* found this principle recognised by *Lord Cowper*, in *Sympson* v. *Hutton* (*a*), which he stated from the registrar's book, to the following effect.

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Thomas Addison, by will, reciting that he had once intended to have made his daughter *Jane* coheiress and equal sharer with his other daughter, but that she having married without his consent, therefore gave her certain provisions out of his real and personal estates; all which he declared to be in satisfaction of her child's part of whatsoever more she might have expected from him, or out of his personal estate: he then devised to his wife; and gave her furniture and other things, all which devises and bequests he declared to be in full of her dower, thirds and other claims at law or in equity, or by any local custom, to any other part of his real or personal estate. He gave the residue to his other daughter, who died in his lifetime, leaving one child, who was the only person that could be intitled, under the statute of distribution, besides the wife and the excluded daughter. By a codicil, he gave the residue to

(*a*) 3 Ves. 335. 11 Vin. Abr. 185, pl. 14, 16. 2 Eq. Ca. Abr. 439, pl. 35, S. C.

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his wife for life, with power to dispose of it after her decease, with the approbation of the trustees. Having this limited power, she made a disposition without the consent of the trustees. The decree declared, that *Frances*, the widow, having disposed without the consent of the trustees, had not pursued her power, and that therefore the testator died intestate as to the residue, which ought to go according to the *statute of distribution*, viz. in thirds, one-third to the plaintiff, *Sympson*, in right of his wife *Jane*, one-third to the child of the deceased daughter, and one-third to the devisee of the widow.

Upon the authority of the above case, *Lord Alvanley* decided *Pickering* v. *Lord Stamford* (*a*). There the testator bequeathed his residuary personal estate to his executors, to be applied to such *charitable* uses as they thought proper. Parts of this fund consisted of real securities; so far, therefore, the bequest was void under the statute of *mortmain*, and such parts of the residue were a resulting trust for the testator's next of kin. A question arose, whether the widow was not excluded from her share under the statute of distribution, since the testator had devised to her parts of his real and personal estates in satisfaction of all dower or thirds which she could have or claim in, out of, or to all or any part of his real and personal estates, or either of them. The solution of this question depended upon the fact whether the testator was to be considered as intending to bar his wife of her dower, &c. generally, and against all persons in every event, or merely in

(*a*) 2 Ves. jun. 272. 3 Ves. jun. 332.

favour of the charitable bequest. If with the latter view and purpose only, then as to so much of the residuary fund as could not be so applied, the widow would, notwithstanding the will, be intitled to a distributive share with the other next of kin, under the statute of distribution. The bequest to the charity was by a codicil, and revoked the testator's will, by which he had given his residuary estate to four persons for their own benefits. *Lord Alvanley*, upon a rehearing, and after great consideration, altered his former decree, and decided in favour of the widow, declaring, that so much of the testator's residuary personal estate as was vested in real securities was divisible according to the statute of distribution, viz. one half to the widow, and the other to the next of kin, as in *Sympson* v. *Hutton*. It appears then, that the foundation of his Honour's decree in the last case was, that the exclusion of the widow's claims upon the testator's residuary personal estate was merely intended for the benefit of the persons to whom such estate was expressly given by the will, and that it was not meant to extend the exclusion farther, viz. in favour of persons succeeding to the property by lapse or otherwise. *Lord Alvanley*, in his first decree, by which he determined against the widow, appears to have been misled by the analogy between this case and those cases that have been decided upon the custom of *London;* for he said, "When this cause was first argued, I thought it was one of great nicety and difficulty, but upon consideration then given to it, and the authority of those cases which were much relied upon by the next of kin respecting the custom of *London*, that where a widow had agreed to accept a consideration for her

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When and when not barred by settlement or will.

widow's share, *although her husband dies intestate*, yet she would *not* be at liberty to claim her widow's share, I was led to think the same doctrine would apply to the case where, *not with a view to guard against intestacy*, but by some provision, he had put her in the same situation of a contract before marriage, and that it would be a bar, let the circumstances under which the claim might arise be what they might; but now, upon rehearing, I am decided by having the very point determined by *Lord Cowper*, who was of opinion, in the case (*a*) I have cited from the registrar's book, that where a testator had given to his wife that provision which he meant to be a satisfaction for any claim she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion, no other person should set it up against the widow."

(*a*) Sympson v. Hutton, *supra*.

CHAPTER XIV.

OF THE HUSBAND'S COVENANTS TO LEAVE, OR SETTLE UPON HIS WIFE PERSONAL ESTATE; AND OF THE PERFORMANCE AND SATISFACTION OF SUCH COVENANTS; AND OF HER TITLE UNDER THE DESCRIPTION OF NEXT OF KIN TO HER HUSBAND.

THE wife may acquire an interest in her husband's personal estate, from his covenant or agreement to settle part of it upon her, or that he will leave, or that his executors shall pay to her a portion of it; or that she shall have all the personal property of which he should be possessed during the marriage, or which he should leave at his death. I propose to consider the subjects of this chapter in the following order:—

I. *The husband's covenant or agreement to settle all the personal estate that he was possessed of when the marriage articles were entered into.*

II. *The construction of his covenant to bequeath or settle all the personal estate which he should be possessed of during the marriage, or should leave at his death.*

III. *What will be a* performance *of his covenant or agreement to settle, or to leave, or that his*

HUSBAND'S COVENANT TO SETTLE THE PERSONAL ESTATE WHICH HE HAD AT THE DATE OF HIS SETTLEMENT.

executors shall pay to his wife a portion of his personal estate.

IV. *Of the* satisfaction *of such a covenant or agreement. And*

V. *Of the wife's interest in such personal estate as by settlement, covenant, &c. was limited, or given, or agreed to be limited to* her *husband's* next of kin, *&c.*

I. The construction of the husband's covenant or agreement to settle all the personal estate, of which he was possessed when the marriage articles were entered into.

When husband covenants to settle *all* his personal estate at the date of the marriage-articles, it is bound from such period. And if invested by him in lands, *semble* that the estate will be the heir's, charged with repayment of the trust money.

It sometimes occurs that a husband previously to his marriage covenants or otherwise engages to convey or settle in favour of his wife, or of her and their children, all the personal estate which he was possessed of at the time of executing articles of settlement. The effect of this covenant is, to change the ownership of the property from the execution of the articles, and the husband ceases to have any interest in it from that period. In such a case, if the proceeds of that estate be afterwards laid out by the husband in the purchase of *real* property in his own name, or otherwise, without reference to the trusts subsisting under the articles, the money so laid out may be followed and demanded out of the real estate for the benefit of the persons intitled to it under the articles, but subject to such a lien or charge, the estate itself (as appears to be the better opinion) will after the husband's death be considered in equity as belonging to his heir or devisee.

In one case, however, which arose upon articles of the above description, the specific lands purchased

with the trust money were considered as belonging to the *cestuique trusts* under the articles, and were decreed to be conveyed accordingly. This was the case of *Randall* v. *Willis* (*a*), in which the articles were to have effect by attaching trusts upon that which was the personal estate of the intended husband at the date of such articles, or which should be so at the end of three months after the marriage. The articles being in consideration of marriage, what was agreed in them to be done, was considered in equity the same as actually and properly completed by conveyance and assignment. From the date of the articles, therefore, the personal estate which the husband *then* had was subjected to the trusts of the settlement. But a settlement was executed after the marriage, which was not considered to have been prepared in conformity with the articles, since such settlement did not contain a covenant to prevent the husband from laying out his personal property, articled to be settled, in the purchase of lands; nor a covenant by him, that whatever part of such personal property should be so invested, the land purchased with it should be considered as his personal estate. The husband died; but in his lifetime he invested the proceeds of the personal property in the purchase of lands which he devised by his will. Upon a question between his surviving wife and the devisee, the Court of Chancery, after declaring the personal estate which the husband was possessed of at the time of the articles, and had been invested in the purchase of lands, to be subject to such articles,

HUSBAND'S COVENANT TO SETTLE THE PERSONAL ESTATE WHICH HE HAD AT THE DATE OF HIS SETTLEMENT.

Notwithstanding the case of Randall v. Willis.

(*a*) 5 Ves. 262.

HUSBAND'S COVENANT TO SETTLE THE PERSONAL ESTATE WHICH HE HAD AT THE DATE OF HIS SETTLEMENT.

ordered the *specific* lands so purchased to be conveyed to the wife, and directed an account of the rents which had been received by the husband's devisee.

This decision, however, as an authority may be reasonably doubted, since the foundation for the decree must have been a *lien* which the widow was supposed to have had upon the purchased estate in consequence of the covenant; but this supposition does not appear to be well grounded; for such a lien, it would seem, could only be established upon the basis of an obligation in the husband to have laid out the money in the purchase of lands; and then, as we have seen (*a*), the law would presume that the estate was purchased in performance of such obligation. But in this case there was no covenant by the husband to invest it in lands; no stipulation in the articles for that purpose; so that there could be no presumption to create a lien upon the lands in favour of the wife. The only other pretence for it is, that the purchase was made with the trust money. But the mere consequence of this would be, as is presumed, to give a right to the widow to follow the trust fund into the estate in which it was invested, according to the observation of *Sir William Grant* in *Lench* v. *Lench* (*b*). *Lord Eldon* seems to have found great difficulty in reconciling the judgment in *Randall* v. *Willis* with the opposite decree which he pronounced in *Lewis* v. *Madocks* (*c*); the distinction, however, that his Lordship laboured to make between the principles

(*a*) *Supra*, vol. i. p. 503. (*b*) 10 Ves. 511—517. (*c*) 17 Ves. 48.

of the two cases (and which will be noticed in the next section), is a difference that is conceived to be difficult to comprehend, since, according to the principle of the case of *Randal* v. *Willis*, trust-money fixed and ascertained, or capable so to be, at the time of marriage articles, if laid out in the purchase of lands by the husband, without any obligation so to do, gives a right to those lands to the *cestuique trusts*, and why there should be a difference when such money accrues from time to time (if that decision were right), it is not easy to understand, since in such case the trusts of the settlement equally attach; in the one immediately upon the execution of the instrument, and in the other immediately as each sum is acquired, so that the inference would be, that if in the one case the *cestuique trusts* were intitled to the estate purchased with the trust funds, they would be so intitled in the other.

HUSBAND'S COVENANT TO SETTLE THE PERSONAL ESTATE WHICH HE HAD AT THE DATE OF HIS SETTLEMENT.

With respect to the liability of personal estate of the husband to his creditors, which is so agreed to be settled upon his wife, as in *Randal* v. *Willis*, it does not appear from the decree in that case whether such creditors were intitled to have their demands satisfied out of any part of that trust estate, bound by the articles. It is conceived, however, that since the articles bound all such personal property as the husband was intitled to at their execution, and that they were entered into for a valuable consideration, such property ceased to be the husband's from the date of those articles and the celebration of the marriage, and that neither his creditors before nor subsequently to the articles could subject any of the property contained in them to their debts (*a*).

When husband agrees to settle the personal estate which he had at date of his marriage articles, such estate is not liable to his creditors.

(*a*) Campion v. Cotton, 17 Ves. 263, and stated Vol. i. p. 297.

HUSBAND'S COVENANT TO SETTLE *ALL* THE PERSONAL ESTATE WHICH HE SHOULD BE POSSESSED OF DURING THE MARRIAGE.

II. The next subject proposed for consideration was, the construction of the husband's covenant to bequeath or settle all the personal estate which he should be possessed of during the marriage, or should leave at his death.

Construction of husband's covenant to settle *all* the personal estate he should be possessed of during the marriage.

1. The reader will have noticed that the case of *Randal* v. *Willis*, mentioned in the last section, differs from the subject now under consideration in this respect, that the agreement was confined to the personal estate which the husband was possessed of at the execution of the articles, or within three months after the marriage, but that in the present instance the agreement embraces all the personal property which the husband should have or acquire during the marriage. Whether this extension of the agreement makes any difference between the two cases in regard to the equity of the widow, against the heir or devisee of her husband, to have the *specific* lands in which the trust-personal estate was invested by him without any obligation so to do, has also been noticed. I shall now observe that it has been decided since the case of *Randal* v. *Willis*, and rightly (as it would seem) upon principle, and by which decision the authority of that case seems to be shaken, that where the husband agrees, in contemplation of marriage, to devise, convey, or assure to his wife all the personal estate and effects that he, during the marriage, shall become possessed of, and he purchase lands with the property subjected to his marriage contract, and dies, such lands will belong to the heir, *charged* with the amount of the purchase-money in favour of the wife (*a*).

(*a*) See Lane v. Dighton, Ambl. 409.

Upon this subject *Lord Eldon* expressed himself as follows, in *Lewis* v. *Madocks* (after stated): "the claim of the wife is put in this way, that personal property bound by the trust or obligation is traced into the purchase of real estate, which estate must therefore be hers. But I do not know of any case in its *circumstances* sufficiently like this, to authorise me to hold that doctrine. I am prepared to say, that the personal estate bound by this obligation, and which has been laid out in this real estate, is personal property that may be demanded out of the real estate; that the estate is chargeable with it, but that it was not so purchased with it that the estate should be decreed to belong not to the heir but to the wife."

HUSBAND'S COVENANT TO SETTLE *ALL* THE PERSONAL ESTATE WHICH HE SHOULD BE POSSESSED OF DURING THE MARRIAGE.

In stating the circumstances, which his Lordship considered as distinguishing that case from *Randal* v. *Willis*, he observed, that in *Lewis* v. *Madocks* the covenant was to settle all the personal estate that the husband should at *any time* be possessed of, attaching upon each article which he had, and that *from time to time* he should become possessed of; but that in *Randal* v. *Willis*, the articles subjected to the settlement-trusts the husband's personal estate which he had at the *date* of such settlement, and not upon any part to be acquired afterwards; his Lordship, therefore, decided in *Lewis* v. *Madocks*, that the husband's heir, and not his widow, was intitled to the real estate, charged, however, with the amount of the personal estate laid out in the purchase of it.

It seems, indeed, difficult to distinguish in principle the last case from that of *Randal* v. *Willis* (as was observed in the last section), which, in giving to the widow *specific* lands purchased with the husband's personal estate, agreed to be settled, instead of charging them in the hands of the devisee with

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the payment of the amount (according to the doctrine laid down in other cases, and recognised by the Master of the Rolls in that of *Lench* v. *Lench*, already referred to), must, it is conceived, be regarded as an anomalous case.

It is necessary to consider what power remains with the husband over his personal estate, after entering into so loose and indefinite a covenant as that in *Lewis* v. *Madocks*. That depends upon the construction of the covenant as to what personal property it attaches, when the parties themselves have been silent upon the subject. Such a covenant is very difficult to execute, yet a Court of Equity will perform it so far as it is able. When it finds a solid subject of personal estate during the marriage, it will attach it to the covenant, rather than render such covenant altogether nugatory. But to expect that a Court of Justice, in the construction of such a covenant, should descend to the *minutiæ* of every petty receipt and expenditure of the husband during the marriage for the purpose of binding them by the contract, would be unreasonable. The covenant, however, will be considered as embracing every species of personal property which the husband shall become possessed of during the coverture, falling under the denomination of principal or *capital*, but not *income* arising from capital, expended by the husband in the usual mode of applying such species of property, as for the support and comfort of himself, wife, and family, and in the discharge of debts contracted for those purposes. *Lord Eldon* accordingly observed, during the argument of the case of *Lewis* v. *Madocks* (*a*), "that he could not adopt the

What personal estate subject to such a general covenant.

Capital.

Not income, except laid up or applied as capital,

(*a*) 17 Ves. 55.

construction that *annual produce*, for instance, dividends of stock, was property acquired during the coverture in the sense of the bond, *except* only to the extent in which the husband himself might think proper to lay up that produce as capital, otherwise that he and his wife would not be at liberty to expend one shilling." From this exception it is to be inferred that annual *income* expended otherwise than in the usual and customary manner, as above, will not be exempted from the operation of the covenant, as if it be applied in the discharge of *gross* sums of money which the husband had borrowed; because those sums from their nature being to be considered as *capital* received by him during the coverture, and therefore within the compass of the covenant, the money of the husband applied in their discharge, must be considered as partaking of the nature of the debt liquidated, and treated by him as *savings* and capital. Savings from income, therefore, may form capital, and for that reason be comprehended within the terms of the covenant; and to that effect *Lord Eldon* expressed an opinion in *Lewis* v. *Madocks*, observing that if a sum of £500, which had been borrowed and discharged by the husband, had been paid by him out of his savings, his Lordship was of opinion that such sum *primâ facie* would be personal estate within the husband's agreement, as having been applied in paying debts (*a*).

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as in payment of money borrowed.

Savings.

Since money borrowed is to be taken as personal estate acquired by the husband during the marriage, within the terms of this his covenant, suppose the husband to take up money upon his personal security,

Semble, if husband borrow money on personal security, and invest it in

(*a*) 17 Ves. 58.

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and to invest it, with part of his own, in the purchase of lands, if he afterwards discharge the money lent to him, his widow will be intitled to reimbursement out of the purchased estate, with *interest* from his death; or if it remain unpaid at his death, it would seem that she is intitled to have it discharged out of the real estate. In such cases, who is to satisfy the claim of the creditor, is a question between the widow and her husband's heir or devisee. Upon this point *Lord Eldon* put the following case in that of *Lewis* v. *Madocks* (*a*): "Suppose the husband, possessing £600, had borrowed £600, and bought an estate of the value of £1200, and died that moment. If the former sum be to answer for the money borrowed, the wife gets nothing by the covenant under such circumstances. I incline to think that the money borrowed must be considered personal estate of which he was possessed. At least that point is fit for discussion, that the husband having borrowed the money, became possessed of it; that all which he had possessed became subject to the uses of the settlement, but as personal estate; and then the widow would with propriety be called upon to pay the £600, for she would have the other for her own benefit."

purchasing land, if he repay it the estate must reimburse his widow, with interest.

So also if it continue unsatisfied,

and the principle seems equally applicable when the money borrowed is secured upon the estate.

The subject last considered was the equity of the widow under the covenant, as against the husband's heir or devisee, when part of the money invested in the purchase of lands was borrowed upon his *personal* security, and afterwards paid off by him before his death, or left by him subsisting at that period. But it may be asked whether the nature of the

(*a*) 8 Ves. 157.

creditor's security will alter that equity? And it is presumed that it will not. In the first case, it is conceived that the personal estate of the husband applied in discharging such security (suppose it to be a mortgage of the estate), ought to be made good out of the property purchased, since such personalty was bound by the prior covenant or agreement of the husband to make the settlement; and, in the second case, that although the mortgagee should obtain payment of his debt out of the husband's personal assets bound by the covenant, yet that in equity the widow would have a right to be refunded out of the lands purchased the amount of the personal estate so applied.

HUSBAND'S COVENANT TO SETTLE *ALL* THE PERSONAL ESTATE WHICH HE SHOULD BE POSSESSED OF DURING THE MARRIAGE.

The most of what has been said during the preceding observations are results drawn from the case of *Lewis* v. *Madocks*(*a*), in which the husband, by his bond previously to marriage, engaged to devise, convey, or assure all such goods, chattels, personal estate, and effects that he at any time during the joint lives of himself and his then intended wife should be possessed of, to their joint use, and to the use of the survivor of them for ever. He, after the marriage, purchased lands for £1600, which sum was made up of £600 his own money, and the residue, viz. £1000, with £21 for the expenses attending the purchase, he borrowed upon his own personal security. Of the £1021 borrowed, the husband discharged £500, and died, leaving £521 unsatisfied. He also, during his life, expended £600 in building a dwelling-house, and in lasting improvements upon the estate. His widow and executrix paid about

(*a*) 8 Ves. 150. 17 Ves. 48.

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£186 in discharge of his remaining debts, funeral and testamentary expenses; and she, before a second marriage, laid out £353 in repairs and lasting improvements upon the purchased lands, and in redemption of the land-tax; into the possession of which lands she had entered upon her husband's death. The husband's personal estate at his decease was £573. *Lord Eldon* decided that the £600, the husband's own money, and the £500 borrowed, but afterwards paid off by him, were on the same footing, and were to be considered as his personal estate laid out, and that the remainder of the sum borrowed and not discharged was to be considered the debt of the purchased estate; that as to lasting improvements made by the widow, since the money advanced by her on that account was *bonâ fide* laid out, she was intitled to an inquiry as to it; and with respect to the £186, his Lordship held, that such sum did not fall within the obligation, observing, "that a great proportion of the debts, about £186, consisted of such particulars, as, in the ordinary course of living in the last year of a man's life, he would incur, with the exception of some small *quit rents*, but which also would be due from him in the course of a proper application of his income, and that they and such particulars could hardly be represented as *debts incurred*, so as that the payment of them would be a breach of the husband's obligation under the bond; that it would be entering into impracticable minuteness to give the wife credit against the real estate for any of the items paid in that schedule;" and his Lordship concluded with the observation "that if persons would enter into an engagement so difficult in construction and application, they must not ex-

Improvements.

pect from a Court of Justice relief so minute in that respect." The final decree declared that the widow was intitled to the £600 and £500, with *interest* from her husband's death; and inquiries were directed as to other matters.

HUSBAND'S COVENANT TO LEAVE TO, OR THAT HIS WIFE SHALL HAVE ALL OR PART OF THE PERSONAL ESTATE OF WHICH HE SHOULD BE POSSESSED AT HIS DEATH.

2. The construction of the husband's covenant that his wife shall have, or that he will leave to her the whole or part of the personal estate which he should be possessed of or intitled to at his death.

Covenant by husband to *leave* all his personal estate at his death to his wife.

The property to which such a covenant attaches is the whole or a proportion of the *clear* personal estate of the covenantor at his death, i. e. upon the residue after payment of all his debts and funeral expenses. It differs so far in effect from the preceding covenant, that the husband is at full liberty during his life to sell, alien, dispose of, or incumber the whole of his personal estate, and utterly to defeat his covenant; yet his engagement is quite consistent with this construction; it only stipulates that the whole or part of that which can be considered his personal property shall be subject to its operation, which is only so much as may remain after all his other *bonâ fide* obligations shall have been satisfied (*a*).

To what property it attaches.

How defeated.

In *Cochran* v. *Graham* (*b*), a deed, executed upon a separation agreed upon between husband and wife, contained a proviso, that if she survived him, and they were at that time living apart according to the instrument, then that she should be intitled to receive her dower, and thirds of all the real and personal estates whatsoever of which he should die seised or possessed during the marriage. They lived separate until the husband's death, who by *will* bequeathed to

Construction of a clause in a deed of separation that notwithstanding such separation wife should have dower and thirds of all his real and personal estates.

(*a*) 10 Ves. 20. (*b*) 19 Ves. 63.

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her one shilling only, and disposed of the whole of his personal property, and appointed executors. A question arose upon the construction of the proviso, viz. whether it was an absolute agreement of the husband to leave his wife such a portion of his personal estate as she should be intitled to under the statute of distribution, if he had died intestate, or merely to place her in the same situation, in regard to her dower and thirds, as if she had not been living apart from him; for if the former was the construction, then she would be intitled to her distributive share of his personal estate notwithstanding the will. But *Lord Eldon* decided, that the meaning of the clause was no more than that, living separate, she should stand precisely in the same situation as if not living apart, with regard to dower and thirds, and consequently that if there had been no separation, since the husband might have barred her interest under the statute by his will, he might equally do so, notwithstanding the terms of the proviso. His Lordship also observed, that if the covenant could be considered as one to leave her such portion of her husband's personal estate as above, he might have spent all his substance, but could not have reserved to himself for his own benefit any part of that which was the subject of such a covenant.

Husband cannot defeat his covenant by will,

It appears, then, that the husband has the complete ownership and power over his personal property, notwithstanding his covenant; but the exercise of that power must be by a complete act in his lifetime, and not by his will (*a*), because the covenant takes precedency of the will, and such a

(*a*) 19 Ves. 71.

disposition would be considered a fraud upon his engagement, in analogy to the rule applicable to the like dispositions by a freeman of the city of *London*, of his personal estate in opposition to his agreement, that it should be distributed according to the custom, which has been before considered (*a*).

HUSBAND'S COVENANT TO LEAVE TO, OR THAT HIS WIFE SHALL HAVE ALL OR PART OF HIS PERSONAL ESTATE OF WHICH HE SHOULD BE POSSESSED AT HIS DEATH.

But the husband's disposition of his personal property, in his lifetime, must be complete, an entire departure with all his interest in it, in order to prevent the transaction being set aside as a device to elude his covenant. In requiring this total change of property the law appears to be strict; for against the husband's diminution of his estate by absolute gift during his life, in fraud of his engagement, the law considers his own interest and convenience a sufficient guard; but it does not draw the same inference or conclusion when, without any diminution of his own enjoyment, he exercises a mere posthumous bounty, although by an irrevocable instrument. The spirit of the covenant requires, that every disposition by him of his personal estate should be excluded, which is in effect testamentary, although not such in form. The gift, therefore, or other disposal by the husband of his personal estate, after entering into such a covenant as that under consideration, ought to be absolute and entire, he ought to part with all his interest, and reserve no partial benefit to himself.

nor by an incomplete act during his life.

But there must be a total change of property.

If, then, he by deed make an absolute disposition of his personal property, with a reservation to himself of the interest for life, this will be a fraud upon

And no interest in it reserved to himself.

(*a*) *Supra*, p. 16 *et seq.*

HUSBAND'S COVENANT TO LEAVE PART OF HIS PERSONAL ESTATE TO HIS WIFE, &c.

his covenant, an attempt to elude it without inconvenience to himself, by an act in effect testamentary (*a*). The subject which next succeeds for consideration is,

What a performance of it.

III. What will be a *performance* of the husband's covenant or agreement to settle, or to leave, or that his executors shall pay to his widow a portion of his personal estate.

Performance.

This subject, so far as relates to the husband's covenant to settle lands in jointure upon his wife, has been before considered (*b*). The distinction also between the different rules applicable to performance and satisfaction has also been attempted to be explained. What now remains to be inquired into, is the performance of the husband's covenants, mentioned in the title to this section, relating to his personal property, the cases upon which are more numerous than on the former.

Rule.

It is a general rule, that if the husband covenant to *leave*, or that his executors shall *pay* to his widow a sum of money or part of his personal estate, and die intestate, so that she becomes intitled to a portion of his personal property under the statute of distribution, such distributive share shall be a performance of the covenant; because the law connects the covenant with the distributive share, and performance is an operation of law solely. The principle seems to be this, that the husband, looking forward to the event of his death, when his wife will have an interest in his property by the pro-

The principle.

(*a*) See Jones v. Martin, 5 Ves. 266, in a note, and Fortescue v. Hennah, 19 Ves. 67. (*b*) Vol. 1. chap. x. p. 501, *et seq.*

vision of the law, declines for that reason to give her any interest in it in his lifetime, considering that his covenant will be as effectually performed by what the law provides for her, as if the provision were made by himself.

HUSBAND'S COVENANT TO LEAVE PART OF HIS PERSONAL ESTATE TO HIS WIFE, &c.

The leading case upon this subject, is *Blandy* v. *Widmore* (*a*).

What a performance of it.

There the husband, by articles before marriage, agreed, that if his wife survived him he would *leave* her £620; and he covenanted that his executors should pay that sum within *three* months after his death. He died intestate, and without issue. His widow became intitled to a moiety of his personal estate by the statute of distribution, and which exceeded £620. *Lord Cowper* held that the distributive share was a performance of the covenant.

The cases considered.

The next case was, *Lee* v. *D'Aranda* (*b*), from which it appears that the husband covenanted by articles preceding his marriage, to *leave* his wife by deed or will £1000 at his death, if she survived him; or that his executors should pay that sum to her within *six* months afterwards. He died intestate; and the question was, whether his widow was intitled to her distributive share of his personal estate, and also to the £1000 under the covenant? But *Lord Hardwicke*, upon the authority of the last case, decided, that the distributive share was a performance of the covenant.

These two cases have settled the law upon the subject, and although it be observable that the distributive shares were not in strictness payable until

Differences between times of payment of the money under the covenant,

(*a*) 1 P. Will. 324. (*b*) 1 Ves. sen. 1. 3 Atk. 419, S. C. by the title of Lee v. Cox.

HUSBAND'S COVENANT TO LEAVE PART OF HIS PERSONAL ESTATE TO HIS WIFE, &c.

the end of a year after the testator's death, and the money under the covenants was to be paid at determinate periods within that time; yet these differences were not permitted to repel the legal presumption of *performance*, as is the case when the question arises upon *satisfaction*, as will afterwards appear when the law upon that subject is considered.

What a performance of it.

In *Garthshore* v. *Chalie* (*a*), *Lord Eldon* expressed himself in relation to the above two cases to the following effect: "They are distinct authorities, that where a husband covenants to *leave* or to *pay* at his death a sum of money to a person who, independent of that engagement, by the relation between them, and the provision of the law attaching upon it, will take a provision, the covenant is to be considered with reference to that; and the Court will not look upon the slight difference between *leaving* and *paying*, nor whether the payment is to be within *three* or *six* months (*b*). In that respect there is always a difference upon what is to be taken in a sense at the end of *twelve* months, but which, I agree, is, in another sense, to be taken from the death of the testator; for the other period is only for convenience, and there is no doubt the property is vested at the death of the party; and if a case were produced in which it was quite clear that there were no debts, the Court would give the fund to the party, notwithstanding there had not been a lapse of twelve months (*c*)".

and the distributive share will not prevent the latter being a performance.

(*a*) 10 Ves. 13. (*b*) Which occurred in the two stated cases of Blandy v. Widmore, and Lee v. D'Aranda. (*c*) See *Lord Eldon*'s observations upon the two cases referred to in the last note, in the case of Twisden v. Twisden, 9 Ves. 426.

HUSBAND'S COVENANT TO LEAVE PART OF HIS PERSONAL ESTATE TO HIS WIFE, &c.

What a performance of it.

It must be noticed, that the covenants in the above two cases of *Blandy* v. *Widmore*, and *Lee* v. *D'Aranda*, could not, from their construction, be broken during the husband's life. There was, therefore, no obligation upon him to make any appropriation or settlement at any period before his death. The money to be received under the covenants, and the wife's distributive share, were duties which became payable after the husband's decease; so that the law presumed the latter to be left by the husband to arise out of his estate after his decease, in performance of his covenant, which was to be discharged out of the *same* estate. But if either of the covenants had been so framed as to have required the money to be settled at a period during the husband's life, and there had been a breach of it before his death, then he would have incurred a *debt* to the widow, which would have converted the question from one of *performance* into that of *satisfaction*, and in such case, according to the rule applicable to that doctrine, (as it will afterwards appear) the debt could only be satisfied by something equally certain and beneficial. According to this distinction between performance and satisfaction *Sir Joseph Jekyll* determined the case of *Oliver* v. *Brigland* alias *Brighouse* (*a*), in which the husband covenanted to *pay* for the benefit of his wife a sum of money *within two years* after the marriage, and that if he died his executors should pay it. He after surviving those years died intestate, and his widow's distributive share of his personal estate was larger than the sum covenanted to be settled upon

But if the covenant be to settle a sum of money on the wife, at some time during the husband's life, and it be broken, the case is one of satisfaction and not of performance, and wife's distributive share will not be a satisfaction of such covenant.

(*a*) Cited 3 Atk. 420. and 1 Ves. sen. 1.

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her; yet since such share was of uncertain amount, and might or might not have equalled in value the debt under the covenant, his Honor decreed that it should not be taken in satisfaction of such debt, but that the widow should have both of them.

What a performance of it.

It is necessary to remark that the case of *Kirkman* v. *Kirkman* (*a*), determined by *Lord Thurlow*, does not impugn the authorities of *Blandy* v. *Widmore* and *Lee* v. *D'Aranda*, although his Lordship does not appear to be thoroughly reconciled to them. That case was decided upon the proviso in the settlement, from which it was inferred that the legal presumption of performance was negatived, since the husband expressly stipulated that nothing thereinbefore contained, nor any provision thereby made or intended for the wife should, or should be construed to deprive her of any legal or customary rights to which she was or might become intitled; nor deprive her taking any provision which he might give, bequeath, or *leave*, her in any manner. It was therefore clear, that her interest in his personal estate, arising from his intestacy, could not be, nor be considered, a performance of his covenant in the settlement to *leave* her at his death, or that his executors should pay to or for her use, either of the sums mentioned in it.

In *Garthshore* v. *Chalie* (*b*) *Lord Eldon* acted upon the two cases of *Blandy* v. *Widmore* and *Lee* v. *D'Aranda*. There *A*, the husband, before his marriage with *B*, covenanted that, if he died before her without leaving a child then living, or in *ventre sa*

(*a*) 1 Bro. C. C. 96, ed. by *Belt, et infra*, p. 21. (*b*) 10 Ves. 1.

mere, his heirs, &c. should within *six* months after his death pay, assign, &c. to or for the benefit of *B* five eighth parts of such real and personal estates as he should be seised of or intitled to at his decease, or if *B* survived him, and there should be a child of the marriage living at his death, or born alive afterwards, then that his or her heirs, &c. should pay, assign, &c. to and for the benefit of *B* one half part of such real and personal estates as before mentioned. There were issue of the marriage living at *A*'s death, and *A* died intestate in the lifetime of *B*. The question was whether *B*'s distributive share under the statute of distribution, was to be considered a performance of *A*'s covenant, i. e. whether *B* was intitled first to a moiety of his personal estate under the covenant, and also to one-third of the remainder under the statute? And *Lord Eldon* determined that *B* could only claim one-half of her husband's personal estate which he was possessed of at his decease; and consequently that what she took by operation of law in consequence of her husband's intestacy, was to be considered in performance of his covenant, and that she could not claim both.

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It will not have escaped the reader's observation that the last case differed from the preceding authorities in the circumstances that the property did not merely consist of personalty but of real and personal estates; and that the widow was not the only person in contemplation at the time when the covenant was entered into, but also the children of the marriage, although no express provision was made for them. These differences were not overlooked in the judgment, but they were considered to be insufficient

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to take the case out of the principle upon which the before-mentioned cases were decided.

What a performance of it.

Sir Thomas Plumer, M. R., proceeded still farther in the case of *Goldsmid* v. *Goldsmid* (*a*), in which he decided, that if the widow take a distributive share of her husband's personal estate, not under an *actual* but a *quasi* intestacy, such share will be a performance of his covenant, that his executors should pay to her a sum of money at his death if he survived her.

A decision that what a widow is intitled to by husband's *equitable* intestacy will be a performance of his covenant.

In that case the husband, by articles before his marriage, covenanted, that if he died before his wife his executors, &c. should, within three calendar months next after his decease, pay to her £3000. He then made a *will*, and after directing his debts to be paid, appointed four persons his executors, to whom he *gave* all his personal estate. He next directed that so much of his capital in business as should not be necessary to pay his debts, funeral expenses, charitable gifts, and for the support of his *wife* and family, should continue in it for *three* years, and then upon trust to divide the whole of his personal property in such ways and proportions as they thought right. He declared that if any of his family disputed the distribution, and proceeded to implead his executors in respect of it, such persons should be excluded from every benefit under his will. Two of the executors died before him, a third renounced the probate of the will, and the fourth executor *proved* it, but never undertook the discretionary trusts, which under the circumstances could not be

(*a*) 1 Swanst. 211.

performed; so that the testator's residuary personal estate was necessarily to be distributed amongst his next of kin in the proportions directed by the statute of distribution. His Honour determined that the distributive share was a performance by the husband of his covenant. The foundation of the decree was that the widow having taken after her husband's death, in the events which happened, precisely the same share of his personal property as she would have done had he died actually intestate, the case was to be classed in principle with the preceding authorities.

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Upon the perusal of the last case the following observations occur. It appears from the cases and the doctrine to be collected from them, that this species of performance is a presumption of law arising upon the permission of the party in leaving that to be done by the law in the distribution of his property which he would otherwise have done himself, and is founded upon the single circumstance that the party has abstained from doing any act whatsoever in regard to his estate. In such a case the law raises a presumption that the share which it provides for the widow was intended by her husband in performance of his covenant. It further appears that the presumption may be repelled by *parol* evidence (*a*). These things being so, the principle of performance does not seem to apply to the last case, because the covenantor was not merely passive but active, since he disposed of all his personal estate by will, and did not permit its distribution by dying legally and actually intestate. On the contrary he

(*a*) 10 Ves. 10.

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meant to dispose of the whole of his estate, which disposition was alone prevented by accidents occurring after his death; hence there is stronger evidence than that by parol to repel the legal presumption of intended performance. And with respect to the testator dying equitably intestate, it appears from the judgment of *Lord Bathurst* and the opinion of *Sir William Grant*, (the late Master of the Rolls) that equitable intestacy is not the same in every respect as legal intestacy, and upon the principle, that when a complete will is made, but there is not an effectual disposition of the residue, the next of kin, although they take their shares *ex necessitate* in the proportions mentioned in the statute of distribution, yet do not so take those proportions under it, but *eodem modo*, as if named in the will (*a*). It, therefore, seems that the case, upon which the present remarks are made, does not fall within the principle of performance, and consequently it might have been expected that the widow would have taken her share of the undisposed residue as also her debt under her husband's covenant.

Exception out of the doctrine of performance when covenant is *entire*, and part of it only can be performed by widow's distributive share under her husband's intestacy.

If the husband's covenant be *entire*, and the provision therein expressed to be secured to the wife is such as the covenant in *part* might be held to be performed by the widow's distributive share under her husband's intestacy, according to the preceding cases, and the remaining part could not be so considered; then since the covenant is entire the Court will not split it, and hold a performance and a non-performance at the same time. In order to illustrate this:—

(*a*) *Supra*, pp. 6, 7.

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Suppose the husband to covenant with trustees that his heirs, &c. should pay to them £6000 within a certain period after his death; upon trust as to £1500 part of the sum for his widow *absolutely* if she survived him; and as to the remaining sum of £4500, to pay the interest of it to her during her *life* or widowhood. Since the last sum, not given absolutely to the widow, could not be considered satisfied by her distributive share; neither could the £1500 be so considered, although she took an absolute interest in it. This was the ground of the decree in *Couch* v. *Stratton* (*a*), and which, by such a resort for the decision, impliedly admits the authority of the former cases upon this subject.

But it will be no objection to the application of the doctrine of performance, that the widow's distributive share is *less* than the amount of her provision under her husband's covenant, as it is in the instances of *satisfaction* after mentioned; because the intention of the husband to perform his covenant by permitting a portion of his property to devolve upon his widow, being an inference of law upon that permission when the two interests are of equal value or the latter more; the inference is continued when the share is inferior in amount to the sum provided by the covenant; so that if the money covenanted to be paid by the husband's executors, &c. be £1000, and the widow's distributive share amount only to £500, such share will nevertheless be a part-performance of the covenant, viz. to the extent of £500.

Part-performance.

The reasonableness of this presumption appears from a supposed case put by *Lord Eldon* in the

(*a*) 4 Ves. 391.

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case of *Gartshore* v. *Chalie* (*a*). His Lordship said that "the Court adverting to the circumstance that the widow will take part of her husband's property at his death, it is difficult to say that if she receive £1000 in discharge of £1000, her residuary share, she takes it in satisfaction of £1000 covenanted to be paid to her, as it is the full amount, but that if such share amount only to £999, she shall not merely have the additional pound but the sum of £1999, for that must be the consequence, where the residue may be only £2000, and she may be contending with others than her children. That is not the natural or legal meaning of such a covenant."

What now remains to be considered is—

Satisfaction of husband's covenant as distinguished from performance.

IV. The *satisfaction* of covenants as distinguished from the performance of them.

In what that difference consists the reader is referred for information to a preceding chapter, in which are considered the performance and satisfaction of the husband's covenants to settle lands in jointure upon his wife (*b*). It is sufficient to remark in this place, that performance is an inference of the covenantor's intention to do so implied by law, and that satisfaction is an inference of his intention arising from his own act and disposition, as by will. Where the provision was actually settled upon the wife, and to commence in the husband's lifetime, and not resting in covenant, and to begin after his decease, the rules of satisfaction in regard to arrears accrued during his life by his testamentary disposition, are treated of in the "Law of Legacies" (*c*). The

(*a*) 10 Ves. 16. (*b*) Vol. 1. chap. 10, p. 506, et seq.
(*c*) 2 Vol. p. 1, &c.

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subjects for consideration in this section are what will be a satisfaction of the husband's covenants or engagements to leave or settle upon his widow a portion of his personal estate. The general rule is, as it has been before stated (*a*), that the thing presumed to be given in satisfaction of that agreed to be done must be exactly of the same nature, and equally certain and beneficial to the widow as the performance of the covenant or obligation. The rule will be exemplified by considering the instances in which testamentary dispositions have been adjudged not to be a satisfaction of the husband's covenant or obligation.

No satisfaction if the bequest be less in amount than the covenant.

1. If the testamentary disposition to, or in favour of the wife, be *inferior* in value to the husband's covenant or obligation, the former will not be presumed or considered to have been given in satisfaction or in *part* satisfaction of the latter; but the benefit which she takes under her husband's testament will be inferred to have been bequeathed to her as a bounty, and accumulative (*b*).

Nor if the legacy be given upon a contingency.

2. If the testamentary disposition be not so beneficial to the wife as her interest under the covenant or obligation of her husband, as when the legacy given to her depends upon a *contingency* (*c*); or where such legacy and the provision by covenant or agreement are payable at *different* times, and the latter is due at an earlier period than the former; these variations between the two provisions will repel the inference of satisfaction.

Nor when it, and the sum covenanted to be paid, are payable at different times.

An instance of the latter kind occurred in the case

(*a*) Vol. 1, chap. 10, p. 506. (*b*) 1 Ves. sen. 263. (*c*) 2 P. Will. 553. 2 Atk. 426.

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of *Haynes* v. *Mico* (*a*): the husband, upon his marriage, entered into a bond to trustees to leave his intended wife £300, *payable in a month after his death*, if she survived him. He, by will, gave to her £500, *payable within six months* after his decease. The question was, whether the legacy was to be taken in satisfaction of the £300 secured by the bond? And *Lord Thurlow* decided in the negative; his Lordship observing, that in *Clark* v. *Sewell* (*b*), *Lord Hardwicke* laid down the rule, that where there was a difference in *any* circumstance, between a legacy and the debt or obligation, the former should not be deemed a satisfaction; therefore, in that case the debt being payable in *one* month, and the legacy in *six* months, made a clear distinction, and repelled any presumption of an intention in the testator to pay the debt.

Nor when the two provisions are of different natures.

3. If the property bequeathed to the widow, and the interest that she is intitled to under the covenant or obligation of her husband, be of *different natures*, or for *different interests*, as if the provision by covenant or agreement be *money*, and that by will be of *lands*, or the wife's estate under the former be *absolute*, and her interest under the latter be for *life* only; these circumstances will also be sufficient to repel the inference of satisfaction (*c*).

Thus in *Forsight* v. *Grant* (*d*), the husband entered into a bond to pay £2000 within three months after his death, to his intended wife for life, then for their children; but if none, then for his wife *absolutely*. After this, he by will gave all his real

(*a*) 1 Bro. C. C. 129, ed. by *Belt*. (*b*) 3 Atk. 96. (*c*) 2 P. Will. 614. (*d*) 1 Ves. jun. 298.

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and personal estates to trustees, upon trust to pay the rents and interest to his wife for *life*, and after that event to divide both real and personal estates among his children, &c. There were no children of the marriage. The question was whether the widow was intitled to the benefit of the bond, and also to the provision in the will? And it was so decreed, it having been admitted by her opponents, that unless she could be put to an election from some expression in the will, the bequest could not be considered a *satisfaction*, because under the bond she was intitled to a *principal* sum within three months after her husband's death, but that under his will she was only intitled to the *rents* and *interest* during her *life*, which were provisions of a *different nature*. Again,—

In *Richardson* v. *Elphinstone* (*a*) the husband covenanted in marriage articles to pay to his wife, if she survived him, £200, free from all deductions, in the name of a jointure, and £50 to provide herself with a house yearly, during life, to commence at *Whitsunday* or *Martlemas* which should first happen after his death. He by will directed his debts to be paid, and devised to his wife for life a house with the goods, plate, &c. in it; and he bequeathed his residuary personal estate to trustees, in trust to invest it in stock, and to permit his wife to receive half-yearly £100 annually during her life. Whether these bequests were a satisfaction of the covenant, was the question. And *Lord Alvanley*, M. R., determined in the negative, and referred to three cases, *Eastwood* v. *Vinke* (*b*), *Broughton* v. *Errington* (*c*), and *Haynes*

(*a*) 2 Ves. jun. 463. (*b*) 2 P. Will. 614, stated vol. 1. p. 508.
(*c*) 7 Bro. Parl. Ca. 461, 8vo. ed. and stated vol. 1. p. 507.

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v. *Mico* (*a*). His Honor's observations are so consistent with what ought to be the rules of property in a *free* state, where the *certainty* of the rule is even more desirable than the principle upon which it is founded, that I shall not consider it an intrusion upon the time of the reader to transcribe his Honor's words, as reported: "After these cases (the three to which he referred), it would be *presumption* for any one sitting where I do to hold this a satisfaction; and when it is considered how much more material it is that *certainty* should be pursued, than that *conjectures* should be formed of the intention, and how easy it would be to say it should be in satisfaction if the testator intended it; even were it *res integra*, I should hold that where a man is under an obligation to do an act, and does it not, but performs something else that may by *ingenuity* be construed a satisfaction, it is *safer* to say, that it is not a satisfaction. The above three cases are nearly upon the same footing as the case of a bond debt due to a stranger. Here if the testator had the articles in contemplation, it is absurd to suppose he should give a real estate in satisfaction for *half*, and an annuity payable and commencing at different times for the other half (provisions so extremely *different*), without expressing it to be a satisfaction. This, therefore, is no satisfaction of the covenant (*b*)."

Nor when the bequest is expressed to be made from a particular motive.

4. Suppose the two provisions to be *ejusdem generis*, and commensurate in interest, yet if the provision by will be expressed to be given for a particular pur-

(*a*) 1 Bro. C. C. 129, stated *supra*, p. 56. (*b*) See also Alleyn v. Alleyn, 2 Ves. sen. 37. Matthews v. Matthews, 2 Ves. sen. 635; and Grave v. Lord Salisbury, 1 Bro. C. C. 425.

pose, or from a particular motive, such purpose or motive will prevent the testamentary gift from being a satisfaction of the covenant or agreement (*a*), because the former was given *diverso intuitu*, which repels the presumption of an intended satisfaction of the latter. Again,

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5. If the benefit given to the widow by will consist of the whole or part of the husband's *residuary* personal estate, it has been decided that such bequest, although it may be eventually of as large or larger amount than the money covenanted or agreed to be paid to or for her by him, or his executors, shall not be a satisfaction of such covenant or agreement; for *non constat* at the date of the will, whether at the testator's death, after all claims upon his property are satisfied, his estate, which is in continual fluctuation till that event happens, will be equally beneficial to the widow as the sum secured to her by the covenant or agreement. It is, therefore, inferred from the nature of a residue, and the uncertainty of its amount, that the husband did not intend by such an indefinite bequest that it should operate as a satisfaction of a certain and definite duty (*b*). This is the principle upon which *Lord Kenyon* professed to decide the case of *Devese* v. *Pontet*, as reported by *Mr. Cox* and *Mr. Finch* (*c*).

Nor when the bequest is of a residue.

In that case the husband covenanted in marriage articles that if his intended wife were the survivor, and there should be no issue, his heirs, &c. should within nine months after his death pay to her £800

(*a*) See the cases last referred to. (*b*) 1 Ves. sen. 520.
(*c*) 1 Cox's Cases, 188, and Pre. Ch. 240, in a note; *et vide* 2 Ves. sen. 37, and 15 Ves. 513.

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for her own use; but if there were any child or children of the marriage, then that the interest should be paid to her for life, and the principal after her death to or among such child or children, &c. Subsequently to this, the husband by will, after bequeathing several specific articles to his wife, directed that all the debts owing to the business which he then carried on, should be collected with all possible despatch; that the household goods and stock in trade should be valued, and the money which should be in the public funds, and the produce of all being collected, the whole should be divided into two equal shares; the one to be the property of his wife, the other of his brother. One question was whether the bequests to the widow were a satisfaction of the testator's covenant? And his Honour decided in the negative, concluding his judgment upon that part of the case thus: "Upon the principle, therefore, of *Lords Somers* and *Hardwicke*, that the residue shall not be taken in satisfaction, I am of opinion that the covenant in the marriage articles is not satisfied by the provision of the will."

The reader must be apprised that *Lord Eldon* ascribes the decision in the last case to the covenant being *entire*, so that as the bequest of the residue could not be a satisfaction of the whole covenant, it should not be so of a *part* of it (*a*); yet it cannot avoid observation, that *Lord Kenyon* expressed the foundation of his decree to be that a residuary bequest was not to be considered a satisfaction of the husband's covenant to pay to the legatee an ascertained sum; and upon the principle before stated.

(*a*) See Gartshore v. Chalie, 10 Ves. 15.

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Yet *Sir W. Grant* thought that a portion might be satisfied by a residuary bequest.

In a subsequent case of *Bengough* v. *Walker* (*a*), *Sir William Grant* appears to have distinguished between a *debt* and a *portion*, and he intimated that a residuary bequest might probably be considered a satisfaction of the latter, if of larger or equal amount; and he alluded to the decision of *Lord Thurlow*, in *Rickman* v. *Morgan* (*b*); yet that case was not decided upon any general rule applying to the doctrine of satisfaction, but upon the proviso in the settlement, "that all subsequent advancements by the father should be deducted out of the portions, *unless otherwise declared* by him in *writing*." The father afterwards bequeathed £4000 to his wife for life, and after her death to *B*, his third son; and he gave to *B* (who was intitled to £8000, the provision in the settlement), the *residue* of his personal estate, which amounted to more than the portion of £8000. The determination was that the bequest should go in satisfaction of *B*'s portion under the settlement. The observations, however, which naturally arise upon the consideration of that case, are that the father had restrained himself to certain terms in regard to the disposition of his property amongst his children subsequently to the date of his marriage settlement, viz. that all future provisions which he should make for any of them should be deducted out of their portions provided by the settlement, without a *written declaration* by him to the *contrary*. The father, therefore, having bequeathed to his son the residue of his personal estate, without making any declaration in writing that it should go in satisfaction of his portion, the Court, upon the face of the settle-

(*a*) 15 Ves. 513. (*b*) 1 Bro. C. C. 63, continued 2 Bro. C. C. 394.

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ment, could not avoid decreeing that such residuary bequest should go in satisfaction of the son's portion under that instrument; and in doing so, *Lord Thurlow* did not, nor did he intend to infringe upon any rule established upon the subject in prior cases.

As to satisfaction of it.

Upon the whole, it is presumed from the intention inferred, as before stated, from the uncertainty in amount of a residue, that a bequest of the whole or of part of it to the widow will not be considered a satisfaction of her husband's covenant or obligation to pay or to leave to her a certain portion of his personal estate.

But when part of the residue is so bequeathed as not to be uncertain in amount, it may be a satisfaction of the covenant,

This principle, however, does not apply when part of the residue is bequeathed in such a form as to afford no uncertainty in regard to the amount of the proportion of it intended to be given. Suppose, then, the husband's covenant be to leave, or that his executors shall pay to his widow £2000; and he devise to her *so much* of his *residuary* personal estate as shall be of the value of £2000. Since the amount of the legacy is equally certain as the sum secured by the covenant, it would seem that the bequest of the £2000 would be a satisfaction of the covenant, to pay to the legatee the sum of £2000 (*a*).

and although it be liable to a charge if there be sufficient remaining to discharge such covenant.

And probably it would make no difference if the value of the bequest appeared to exceed the sum stipulated to be left or paid, although it were made subject to a charge; for if the Court were able to perceive that after allowing for such charge there remained a surplus of the sum bequeathed, greater than or equal to the husband's obligation or covenant,

(*a*) See 15 Ves. 514.

why in that case the bequest should not be considered a satisfaction of the covenant no solid reason appears. "If," said the Master of the Rolls, in *Bengough* v. *Walker* (*a*), "I see that the bequest is so large, so far exceeding the portion, that the diminution of the burthen imposed upon it cannot affect the relative proportion, it would be against common sense to say, that if a bequest of ten times the amount of the portion is burthened with a charge not to the extent of a tenth part, the remainder, though greatly exceeding the portion, shall not be a satisfaction."

WIFE'S TITLE AS ONE OF HUSBAND'S "NEXT OF KIN," &c.

The presumption once raised upon the husband's will, that a devise was intended by him in satisfaction of his covenant, may, like other presumptions, be repelled by *parol* evidence (*b*); but it is conceived that such testimony is inadmissible to *raise* the presumption, by showing that he *meant* to satisfy his covenant, when no such intention appears or can be legally inferred from his will (*c*).

Parol evidence.

V. With respect to the title of the wife, surviving her husband, to a share of such part of his personal estate as was limited "to his next of kin," or "to his next of kin or personal representatives," or "to his relations," what has been detailed in a prior chapter (*d*) whilst treating upon the husband's right as his wife's next of kin, applies to the case now under consideration.

The rule may be considered settled, that if the ultimate limitation of personal property in a settlement or will be made to the husband's "next of kin,"

(*a*) 15 Ves. 515. (*b*) See Jeacock v. Falkener, 1 Bro. C. C. 295. Pole v. Lord Somers, 6 Ves. 319. Druce v. Denison, ibid. 385, 397. 10 Ves. 10. (*c*) Sowden v. Sowden, 1 Bro. C. C. 583, ed. by *Belt*. Also see vol. 1. p. 466. (*d*) Chap. viii. vol. 1. p. 326.

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or "to his next of kin or personal representatives," or "to his relations," or if he by will bequeath his personal estate as above, his widow will be *primâ facie* excluded; because the statute of distribution, according to which the property is to be divided, includes under the term "kin," or "kindred," such persons only as are related to the husband by *blood*; a description not answered by the widow.

Limitations to husband's next of kin.

Thus in *Nichols* v. *Savage* (*a*), the testator bequeathed his residuary personal estate in this manner; "to all and every my next of kin that would have been intitled to my personal estate under the statute made for distribution of intestate's estates, in case I had died intestate:" the Court decided that the widow was not intitled to a share with the testator's next of kin. Again,

In *Garrick* v. *Lord Camden* (*b*), the widow's claim depended upon the construction to be put on the following clause in her husband's will; "and in case after the payment of all the said legacies, bequests, and expenses, there shall remain any surplus money or personal estate, I direct the same to be divided amongst my next of kin, as if I had died intestate." It was contended for the widow, that the Court ought to construe the words, "amongst my next of kin, as if I had died intestate," as if the clause had stood thus; "to be divided as if I had died intestate," omitting the words "amongst my next of kin (*c*);" but *Lord Eldon* observed, that the whole course of modern authority was against taking that as the *first* construction of the words; and that whatever might

(*a*) Cited 18 Ves. 53. (*b*) 14 Ves. 376, 381, 386. (*c*) For the effect of such a clause, see vol. 1. p. 329.

have fallen from judges, describing the husband as next of kin to his wife, the tenor and bent of modern decisions went to this extent,—that if a husband bequeathed to his next of kin, that bequest did not *primâ facie* include his wife; and that it was quite clear that if a married woman, under a power by settlement, bequeathed to her next of kin, it would be impossible to hold, that under the construction of such a will, *without more*, the husband would take as sole next of kin. The opinion of his Lordship in the present case, was thus expressed; "Upon the whole, I think the widow is not one of the next of kin in the ordinary sense, or in the sense in which the testator used the words."

WIFE'S TITLE AS ONE OF HUSBAND'S NEXT OF KIN, &c.

So also in *Davies* v. *Baily* (*a*), the husband bequeathed to trustees his residuary estate, to pay the interest of it to his wife for life (which raised a strong inference of his intention that his widow was to take no other interest in that fund); and after her death he gave the capital "to such of his *relations* as would be intitled thereto by the laws in force, of distribution, to be divided as the said laws direct." *Lord Hardwicke*, after commenting upon the relation between husband and wife to the effect before stated, decreed, under all the circumstances of the case, that the widow was not intitled to any part of the principal of the residuary estate.

To his relations.

The last case was followed by that of *Worseley* v. *Johnson* (*b*), in which the husband, after devising his lands to his wife for life, remainder to *A* in tail, directed that in default or failure of issue of *A*, the

(*a*) 1 Ves. sen. 84. (*b*) 3 Atk. 758; see also Maitland v. Adair, 3 Ves. 231.

WIFE'S TITLE AS ONE OF HUSBAND'S NEXT OF KIN.

lands should be sold, and the money divided "amongst his *relations*, according to the statute for distribution of intestate's estates where no will is made;" and he then gave certain houses in *F* to his wife in fee. After the death of the wife, and the death and failure of issue of *A*, the wife's executor filed a bill for a sale of the lands, claiming a moiety of the proceeds under the statute of distribution; but *Lord Hardwicke*, upon the same principles which governed his decision in *Davies* v. *Baily*, dismissed the bill.

From the last two cases, and from what fell from *Lord Eldon* in the case of *Garrick* v. *Camden*, there can be no doubt that limitations to the husband's next of kin, &c., may be attended with such circumstances as to intitle his widow to participate in the property so limited, but such a case does not appear to have yet happened.

To his personal representatives.

With respect to the widow's title, under limitations of personal estate, "to the legal personal representatives of the husband," there appears *primâ facie* no objection to her taking under that description; for the legal personal representative of the husband is his executor or administrator; and if his widow be clothed with either character (an event which may happen), she then answers the description in the instrument, and for that reason can show a good *primâ facie* title (*a*). But as the widow may take a share, under a limitation, to her husband's next of kin (as we have seen), under the particular circumstances which might attend such limitation, so also she may be excluded from taking any beneficial interest in

(*a*) 1 Anstr. 128.

the character of her husband's legal personal representative, when such an intention can be collected from the instrument in which the limitation is contained. When, therefore, the limitation occurs in the husband's marriage settlement, *Sir William Grant*'s observations in *Bailey* v. *Wright* (*a*), for the widow's exclusion, apply; and in what other instances this legal title may and may not be defeated under particular circumstances, the cases referred to in the note (*b*), will assist the reader.

WIFE'S TITLE AS ONE OF HUSBAND'S NEXT OF KIN, &c.

(*a*) See vol. I. p. 327. (*b*) Evans v. Charles, 1 Anstr. 128. Bridge v. Abbot, 3 Bro. C. C. 224. Jennings v. Gallimore, 3 Ves. 146. Long v. Blackall, 3 Ves. 486.

CHAPTER XV.

THE EFFECTS OF MARRIAGE UPON THE ACTS AND AGREEMENTS OF HUSBAND AND WIFE PRIOR TO MARRIAGE; AND THE HUSBAND'S LIABILITY IN RESPECT OF THOSE ACTS AND AGREEMENTS.

It is proposed to consider the subjects falling within the above division of this treatise under the two following *heads* or sections:—

I. *The effects of marriage upon the wife's acts and agreements while single, and the liability of the husband in respect thereof.* And,

II. *The effects of marriage upon the prior acts and agreements of the husband, with or in relation to the wife, and his liability to perform the same.*

I. The effects of marriage upon the wife's acts and agreements whilst single, and the husband's liability in respect of them.

1. The unity of persons which the law in policy creates in husband and wife, operates to extinguish or revoke several acts of the wife, prior to marriage, that might prove injurious to her husband, and to which he was neither privy nor consenting.

In what instances the disposal by the wife of her property, before and in contemplation of marriage, will be fraudulent and void against her husband, has

been before considered (*a*). She is not allowed to make or appoint an attorney without her husband's concurrence, for that would enable her to charge him without his consent, and this is one of the reasons why he is a necessary party in all actions brought by her as is afterwards noticed. Upon the same principle, if the wife *dum sola execute* a warrant of attorney, it will be revoked by her subsequent marriage. But the reason does not apply to the instance of her *acceptance* of such a warrant to confess a judgment, so that if a warrant of attorney be given to her, whilst single, to confess a judgment, and she afterwards marry, it will not be revoked by her subsequent marriage, and the Court will give leave to enter up judgment upon it (*b*). Again,

MARRIAGE, WHEN AND WHEN NOT A REVOCATION.

Marriage a revocation of wife's warrant of attorney,

not of her acceptance of such a warrant.

In *Blunden* v. *Baugh* (*c*), *Jones*, *Berkley*, and *Croke*, Js., said, that where a woman, lessee at *will*, marries, or where a single woman grants a lease at *will*, and then takes a husband, although she has placed her will in his hands, yet the marriage shall not be considered a determination of it without the *election* of the lessor or husband to the contrary.

Woman lessee at will marries, marriage not a revocation.

2. If a woman make a will and afterwards marry, the marriage will be a revocation of the will; first, because it was her own act in taking a husband subsequently to its date; and, secondly, because the construction that marriage is only a revocation, in case the wife show her intention that it should be so, might be disadvantageous to her, since the husband, by the exercise of undue influence, might oblige her

But marriage is a revocation of a woman's will and testament.

(*a*) Vol. 1. p. 160. (*b*) Anon. Salk. 117. (*c*) Cro. Car. 304. Henstead's case, 5 Rep. 10. S. P.

MARRIAGE, WHEN AND WHEN NOT A REVOCATION.

to revoke or to continue the will as best suited his interest (*a*).

But it has been said (*b*), that if the wife survive her husband, the revocation or countermand of the will by marriage is done away, upon the principle that the disability of marriage being removed, there is nothing to prevent the will made prior to the coverture from taking effect at her death. But this doctrine is not altogether free from objection; for it is essential to the nature of a will that it should be ambulatory and liable to be altered or revoked at any period during the life of the testator. This being so, the woman, by marrying, disables herself from making any other will, or altering or revoking the old one, so that the instrument upon the marriage ceases to fall under the essential description of a will; and, as it is conceived, must be void, whether the woman survive her husband or not (*c*). And mark the distinction when the disability is to be imputed to the party, and when to the visitation of God; for if a person, after making his will, become *non sanæ memoriæ*, the disability will not revoke it (*d*).

Notwithstanding the husband's agreement to it before marriage.

Although the husband by articles, or otherwise in writing, consent to a will made by his intended wife *before* marriage, containing dispositions of her real estate, such consent will not prevent the revocation effected by the subsequent marriage, but the wife's heir will at *law* (*e*) be intitled to the estate after her death.

(*a*) Forse v. Hembling, 4 Rep. 61. (*b*) Plow. Com. 343, *a*.
(*c*) 2 Bro. C. C. 544. 2 Term Rep. 697. (*d*) 4 Rep. 61, *b*.
(*e*) For the equitable doctrine relating to the present subject see chap. xix. sect. 1.

MARRIAGE, WHEN AND WHEN NOT A REVOCATION.

Thus, in *George* v. —— (*a*) *A*, in *August* 1712, *surrendered* her copyhold lands to the uses of her will, and, in *November* 1714, she, upon and prior to her marriage with *B*, entered into articles reciting the surrender, and that *B* agreed that she *should have power* to settle her estate, or to devise it during the marriage without his contradiction. In *June* 1736, she and her husband mortgaged the premises for ninety-nine years, but no fine was levied nor surrender made, and, in *August* 1743, she made a will reciting her power, purporting by it to dispose of the copyhold estate. Upon her death, her heir claimed the premises against her will. And *Willes*, C. J., and *Birch*, J., decided in favour of the claim; the former observing, that the surrender by the wife when *sole* became void, or at least was suspended by the subsequent marriage; that the Lord could never be considered a trustee, as the fee-simple remained in the copyholder; and that since a married woman could not make a will nor declare the uses of a surrender which was void or suspended by the marriage, her heir was intitled.

The above case supports the opinion of *Ashurst*, J., in *Hodsden* v. *Staple*, next stated; and which latter case establishes this doctrine, that if a will be made by a woman before marriage, and her husband before such marriage, but after the date of the instrument, agree "that she may dispose of her real estates by will," the will alluded to is to be considered a *subsequent* will, so that the agreement (supposing it to be effectual as to a subsequent will (*b*)), cannot authorise or protect the will previously made,

(*a*) Ambl. 627. (*b*) See *infra*, chap. xix. sect. 1.

MARRIAGE, WHEN AND WHEN NOT A REVOCATION.

which must, therefore, be revoked by the marriage, both at law and in equity.

Instance of husband's agreement being construed not to extend to wife's will made before the marriage.

Accordingly, in the case of *Hodsden* v. *Staple* (*a*), *A*, in contemplation of a marriage with *B*, signed a paper writing *without seal* or stamp, which, after reciting the intended marriage with *B* her future husband, and that she was intitled to considerable real and personal property, stated, that it was agreed that her fortune should be settled to their joint use, for her life, or the life of the survivor, and that if she survived, her whole fortune, together with her plate and jewels, should be settled to her own use, but that *if she died first, then, that her fortune should be at her own disposal.* *B* signed a duplicate of the paper. On the *same* day *A* made her will, duly executed to pass freehold property, giving the interest of her fortune to *B*, her intended husband, and after specific devises (but not mentioning the reversion in the premises), she gave her estate and residuary effects to *B*, whom she appointed executor. On the *same* day the marriage was solemnized, and *A* afterwards died before *B* without issue. The question was between *B*, the husband's devisee, and the heir of *A* who claimed the property, under the presumption that the will of *A* was revoked by her marriage; and so the Court determined; for as the will was made before the marriage, it was revoked, and it was not supported by the agreement, which was not a deed for want of a *seal*, so that it could not operate as a covenant by the husband to stand seised to uses; and *Ashurst*, J., observed, that the agreement referred to an *executory* act, and not to a will made prior to the

(*a*) 2 Term Rep. 684.

marriage; and he said, that it might have been a great doubt whether it could have been agreed that the marriage should not revoke the will, even if there had been words for the purpose; because it would be a stipulation in direct opposition to a positive rule of law (*a*).

MARRIAGE, WHEN AND WHEN NOT A RELEASE OF WIFE'S DEBTS TO HER HUSBAND BEFORE MARRIAGE.

3. A submission to arbitration will be revoked if a party, a single woman, marry before the award; and it will make no difference if the arbitrator afterwards make his award without notice of that event (*b*).

Submission to arbitration revoked by a woman's marriage.

4. In some instances marriage will operate as a release.

Of release by marriage.

Thus, if the wife give a bond to her intended husband, in consideration of the expected marriage, binding herself in that event to convey her real estates to him in fee simple, the obligation will be extinguished and released at law by the marriage, for the reason after mentioned, but it will be supported in equity, as it was determined by *Lord Macclesfield*, in *Cannel* v. *Buckle* (*c*), who observed, that the impropriety of the security, as of a bond from a woman to a man whom she intended to marry, or the inaccurate manner of wording it, was not material in equity; for it was there sufficient that the bond was a *written evidence* of the agreement of the parties, that the wife, in contemplation and consideration of marriage, agreed that her intended husband should have the land as her portion; which agreement being upon a valuable consideration should be executed in equity, for it was unreasonable

Wife's bond.

(*a*) See 1 Lord Raym. 516. (*b*) 1 Bac. Abr. 483. (*c*) 2 P. Will. 243.

HUSBAND'S LIABILITY FOR DEBTS OWING BY WIFE AT TIME OF MARRIAGE.

that the marriage, upon which alone the bond was to take effect, should itself be a destruction of such bond; that the foundation of the notion was, that in law, the husband and wife being one person, he could not sue his wife upon the agreement, but that was not so in equity, since they might there implead each other.

Husband's liability for his wife's debts due at time of marriage.

5. With respect to debts which the wife contracted whilst single, and remained due at the time of the marriage, the husband is liable, and it is but reasonable that the law which, by the marriage, gives to the husband all his wife's personal estate in possession, and the power of recovering or disposing of all her personal property in action or in contingency, that by possibility may fall into possession during the coverture, should make the husband liable for his wife's debts, owing at the period of the marriage.

His responsibility continues only during the marriage.

This liability, however, as it originates in the marriage, ceases with it; so that if the debts be not recovered during its continuance, the husband will be discharged if he survive his wife (*a*).

His liability in respect of property received with wife,

This discharge of the husband will not be altered, although he may have received a large fortune with his wife, and it seems to be just, because his liability would have been the same if he had received nothing with her. But a distinction prevails upon this subject which is necessary to be attended to, viz. between such part of the wife's estate which the husband receives *qua maritus*, and such portion of it as

as her administrator.

does not belong to him in that character, but as the *administrator* of his wife: in the first case, his re-

(*a*) Roll. Abr. 351.

sponsibility for his wife's debts due at the period of the marriage determines with her life; in the second, he is liable to answer to the extent of her assets, for since he cannot recover her property outstanding at her death, except as her administrator, it will, as in ordinary instances, be assets to pay her debts.

HUSBAND'S LIABILITY FOR DEBTS OWING BY WIFE AT TIME OF MARRIAGE.

Thus in *Heard* v. *Stanford* (*a*), the defendant's wife, before marriage, gave a note for £50 to the plaintiff in consideration of five years' service, and then married the defendant, who received with her a fortune of £700; part of which consisted of *choses in action*, some of which the defendant received as *husband*, and the remainder he took as *administrator* to his wife. The question was, how far in equity the husband was liable to pay this debt of his wife? And *Lord Talbot*, after detailing the law upon the husband's liability, decreed an account of what the husband had received since his wife's death as her administrator, and declared that the husband should be liable for so much only. And as to any further demand, he dismissed the bill. In regard to *Powell* v. *Bell* (*b*), which had been cited, his Lordship observed, that there the wife was administratrix of her first husband; that it did not appear what she had in her own right, and what as administratrix; in the latter of which cases the marriage was no gift in law of the property which she had in *autre droit*; and that upon the last reason only were founded all the cases where a surviving husband had been charged with his wife's debts after her death.

(*a*) Ca. Temp. Talbot, 173. See also Thomond v. Earl of Suffolk, 1 P. Will. 465—468. (*b*) Pre. Ch. 255; *et vide* Sanderson v. Crouch, 2 Vern. 118.

HUSBAND'S LIABILITY FOR DEBTS OWING BY WIFE AT TIME OF MARRIAGE.

The principle of those cases is, that the wife being executrix or administratrix, the assets which the husband received during the marriage in right of his wife as such executrix or administratrix, and which he had a right to receive, made him after his wife's death an accounting party to the persons intitled to them. This subject has been fully discussed in the first volume of this work (*a*), to which the reader is referred.

With respect to judgments obtained for debts owing by the wife whilst single, there is this distinction in regard to the husband's liability.

When judgment is obtained against wife before marriage; when against her and husband, and she dies in each case before execution.

If the judgment be recovered previously to the marriage, and the wife die before the suing out of execution, the husband will be discharged from the demand; but if the judgment had been recovered against both of them, and the wife died before execution, the husband will continue charged; because by the judgment the nature of the debt was altered, and from that time it became his own debt (*b*).

How execution is to issue upon the former judgment.

And of the necessity of making husband a party by a *scire facias*.

When a judgment is obtained for a debt against a single woman, who afterwards marries, the execution upon it must be against her alone, because the execution must follow the judgment. But if it be desired to charge a person with the debt recovered, who was no party to the record, as the husband in this case, a *scire facias* ought to be issued making him a party to it (*c*).

(*a*) Page 187, *et seq.* (*b*) Obrian v. Ram, 3 Mod. 186. Eyres v. Coward, Sid. 337. Treviban v. Lawrence, 2 Lord Raym. Rep. 1050. (*c*) Cooper v. Hunchin, 4 East 521. The liability of the husband surviving his wife for her devastavit, in consequence of proceedings at law against them, is mentioned in vol. i. p. 199.

II. The effect of the marriage upon the prior acts and agreements of the husband with or in relation to his wife, and his liability to perform such acts and agreements.

MARRIAGE, WHEN AND WHEN NOT A RELEASE OF HUSBAND'S OBLIGATIONS TO WIFE BEFORE MARRIAGE.

In *Ewbank* v. *Hallowell*(*a*), *Lord Thurlow* decided that a legacy given to the wife by her husband's will made before the marriage, was not revoked by such marriage.

1. It is a general rule, where a man marries a woman to whom he is indebted, that the debt is thereby released. But this rule only extends to contracts for debts which are due in *præsenti*, or which *may* become payable at some period *during* the marriage; so that such contracts between the husband and wife, which from their nature can give no right of action during the coverture, are not released or extinguished by it. In order to exemplify this; if the husband obligor take the obligee to wife, the bond is discharged at law (*b*), because husband and wife make but one person in law, which unity of persons disables the wife from suing her husband. But if the husband *before* the marriage give a bond to his *intended* wife, with a condition to avoid it, if *he left her a certain sum of money at his death*, the obligation would not be dissolved by their marriage; for the engagement never ripened into a duty during the husband's life, and it could not have been released by him (*c*). Thus it appears, that the express agreement of the parties

Rule, that if a man obligor marry the obligee, the debt is released at law.

Exception, when the debt cannot accrue due during the marriage.

(*a*) 2 Bro. C. C. 220. (*b*) Co. Litt. 264, *b*. (*c*) Smith v. Stafford, Hob. 216. Clark v. Thomson, Cro. Jac. 571. Tylle v. Peirce, Cro. Car. 376.

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created a right not inconsistent with the rules of marriage; so that, although the right be *suspended*, it is *not extinguished* by it.

The leading case upon this subject (which has also received the additional authority of *Lord Kenyon* (*a*)) is *Gage* v. *Acton* (*b*). There, to an action of debt for rent against an administratrix, she pleaded that the intestate, in his lifetime, in consideration of a marriage to be solemnised between him and herself, became bound to her in a bond of £2000, conditioned for the payment of £1000 within a certain time after the intestate's death, if she survived him. She then averred that the marriage took effect, the death of the intestate, and that the £1000 had not been paid; that she had taken out administration, and that £250 assets came to her hands, which she retained in satisfaction of the bond, &c. Upon demurrer, *Gould* and *Turton*, Justices, were of opinion (*Holt*, Ch. J. *dissentiente*) that the bond was not extinguished by the marriage; so that the demurrer was overruled.

And in the modern case of *Milbourn* v. *Ewart* (*c*), the husband before the marriage gave to his wife a bond conditioned for the payment of £3000 by his heirs or executors at the end of twelve months *after* his death. The Court held that the bond was not released by the marriage, and they approved of the decision in *Gage* v. *Acton*.

Such bonds and engagements as those before mentioned being valid at law and binding the hus-

(*a*) 5 Term Rep. 384. (*b*) 1 Ld. Raym. Rep. 515.
(*c*) 5 Term Rep. 381.

band's estate, there is no necessity from the contrary fact to appeal to the jurisdiction of a Court of Equity to carry into effect the intention of the parties, which that Court will do when its interference is necessary, as appears from the before mentioned case of *Cannel* v. *Buckle* (*a*); and it seems that the same rules and distinctions apply to covenants entered into by the husband with his wife before marriage, as in the instances of bonds given by him to her (*b*).

MARRIAGE, WHEN AND WHEN NOT A RELEASE OF HUSBAND'S OBLIGATIONS TO WIFE BEFORE MARRIAGE.

When, previously to the marriage, a bond is given by the husband to a person in trust for his intended wife, so that she is *cestuique trust* of such bond; or if she *dum sola* lend money, and take a bond in the name of a trustee, marriage will not in either case revoke it; for in both cases the legal right to sue is in the trustee, and there is no inconsistency between the right of action, and the law arising out of the relation of marriage.

Husband's bond before marriage to a *trustee* for wife not released by the marriage.

Accordingly, in *Cotton* v. *Cotton* (*c*), the wife, during her subsequent widowhood, lent £200, part of the assets of her first husband, to *A* the plaintiff's son, who, with the plaintiff as surety, gave a bond to the defendant *B* in trust for the other defendant, the widow, for repayment of the money. The widow married *A*, one of the obligors, and survived him. The bond having been put in suit, the plaintiff, the surety, filed a bill to be relieved against it, insisting that by the marriage of the *cestuique trust* of the bond with the principal obligor, the bond was released in equity, as it would have been at law, if it had been made to the widow before her second mar-

(*a*) *Supra*, p. 73. (*b*) 1 Ld. Raym. Rep. 517. (*c*) Pre. Ch. 41.

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riage; but the Court refused to relieve the surety; and the decree was afterwards confirmed by *Lord Somers* (*a*).

Marriage of an executrix with a debtor to the estate, no release.

So also if the wife be executrix or administratrix, and marry a man who is debtor to the estate, the debt is not released by the marriage, because such a construction would have the effect of a devastavit, and it is a known maxim that the law works no injury (*b*).

2. Securities given by the husband directly to his wife before and in contemplation of marriage being either good at law or in equity, it follows that either he or his estate is liable to discharge them.

Widow's right to retain out of husband's assets his bond before marriage to leave or pay to her a sum of money, she being his executrix.

It may happen, in a case where the husband gives a bond prior to marriage to his intended wife, or to a trustee for her, to leave or pay her *after* his death a sum of money, that he appoints her executrix. In that event, she may either retain the amount of the bond against all other debts in equal degree, or she may pay it over to her trustees; but if in the latter case the payment be made with her own money, she has a right of retainer as above; or if she satisfy the debt out of her husband's assets, she will be allowed equal benefit of the payment. The case of *Marriot* v. *Thompson* (*c*) places these matters in a clear point of view:—

The action was brought against a widow the executrix of her husband, by one of his bond-creditors; and it appears from the widow's plea, that prior to the marriage her husband gave a bond to two

(*a*) Reg. Lib. 1692. (A) fo. 496. (*b*) Dorchester v. Webb, Cro. Car. 372. (*c*) Willes' Rep. 186.

MARRIAGE, WHEN AND WHEN NOT A RELEASE OF HUSBAND'S OBLIGATIONS TO WIFE BEFORE MARRIAGE.

trustees, conditioned to leave to her at his death, if she survived him, £400; that the marriage took effect; that he appointed her executrix of his will, which she proved; and that the debt was due. She then pleaded *plene administravit, minus £5*, which she insisted upon retaining in part satisfaction of her bond-debt. The plaintiff demurred; first, because the bond being made to *trustees*, the widow could not retain, since the money was not a debt due to her at law, but to the trustees. The Court however overruled the objection, observing, that if the money had been directed to be paid *to* the trustees, it would have been fatal to the plea; yet, although in that case she could not have retained, she might have paid the money to the trustees, and insisted upon the payment; or she might have paid it out of her own money, and have retained assets *pro tanto* (*a*); but that, since by the condition of the bond payment was to be made to the widow, she was intitled to retain (*b*); and whether the words were to *leave* or *to pay* to the widow would make no difference (*c*).

But the husband may become insolvent and a bankrupt; in which case, his liability to perform his engagements before marriage with or in favour of his wife will undergo a material change, which we shall next consider, having in a preceding chapter treated upon the wife's equities in her own unrecovered choses in action, against her husband and his assignees (*d*).

(*a*) Dy. 2, *a*. 2 Roll. Abr. 684, pl. 11. Cleydon v. Spensar, Moor 2. (*b*) T. Raym. 483. 2 Show. 403. Skin. 214. (*c*) 2 P. Will. 298. 2 Black. Rep. 965. (*d*) Vol. I. chap. vii. p. 257, *et seq*.

WIFE'S RIGHTS UNDER HER HUSBAND'S BANKRUPTCY.

Wife's rights under husband's bankruptcy.

Previously to the statute 7 George 1, chap. 31, debts only which had become due, or, if secured by bonds, when the penalties became forfeited, as by the irregular payments of interest, or of annuities, when such were the conditions of the bonds, could be proved under a commission of bankruptcy (*a*); so that money secured to be paid *in futuro* was not allowed to be proved, since there was nothing due from the bankrupt in respect of it at the time of his bankruptcy (*b*). But since the statutes of 7 Geo. 1 and 49 Geo. 3, chap. 121, debts or sums of money secured to be paid at future and *certain* periods, not arrived at the time of the bankruptcy, may be proved under the commission, deducting out of the dividends legal interest from the day of the order for a dividend; the rebate of interest being to be computed upon the amount of the dividends actually received, and not upon the amount of the whole debt.

As to proof under statutes of rebate.

Rebate of interest.

But the law continues the same as before the passing of the above statutes, when the future periods at which the husband's obligations are to be performed, either depend upon *contingencies;* or when the times of payment must arrive, but are incapable of being ascertained. When, however, there is no objection upon these grounds, the husband's obligation before marriage to or in favour of his wife may be proved under his bankruptcy, whether the duty be a legal or equitable demand, although an obligation of the latter kind is insufficient to support a commission (*c*).

No distinction between a legal and *equitable* obligation in regard to proof.

(*a*) Ex parte Winchester, 1 Atk. 116. (*b*) Ex parte Groome, 1 Atk. 115. (*c*) 1 Atk. 147. Medlicot's case, 2 Stra. 899. Ex parte Stephens, 11 Ves. 24. Ex parte Hanson, 12 Ves. 346.

WIFE'S RIGHTS UNDER HER HUSBAND'S BANKRUPTCY.

If, then, in contemplation of marriage, a bond were given by the intended husband *to* the wife to pay to her, or to trustees for her, a sum of money at a certain period during the marriage; although the right of action be gone or suspended at law by the marriage, it is presumed that the Chancellor, sitting in bankruptcy, would order the amount of the obligation to be proved under the commission, and a dividend to be received in respect of it; for the bond being for a valuable consideration, falls within the provisions of the above statutes (*a*).

When the bond is given by the husband before marriage to a *trustee* for his intended wife, it may be proved in all instances where a similar security to any other person can be admitted.

As to contingent and future debts.

But according to what has been before observed, if the husband's obligation be contingent, it cannot be proved under the acts, because the event upon which it is made to be a charge upon the husband's estate may never happen. Suppose, then, a bond to be given by the husband before marriage, to or in trust for his intended wife, conditioned to leave or pay to, or for her, a sum of money after his death, *if she survived him;* the contingency of survivorship will prevent the proof of the bond under the commission.

Of this opinion were the Judges in *Tully* v. *Sparkes* (*b*), who observed, that in such a case it was impossible to make any rebate of interest as

(*a*) See Pattison v. Bankes, and ex parte Cottrell, Cowp. 540—742. (*b*) 2 Lord Raymond, 1546. 2 Stra. 867, S. C.; and see Staines v. Planck, 8 Term Rep. 386; and what was said by Lord Eldon, 9 Ves. 111.

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directed by the statute 7 Geo. I. before referred to. And in ex parte *Barker* (*a*), *Lord Eldon* determined, that in order to bring the debt within the statute of rebate, so as under its authority to enable the demand to be proved, such debt or obligation must not only be devested of contingency, but that it must also be made payable at a *certain* time.

If husband's bond be forfeited before bankruptcy it may be proved.

Although such be the rules as to proof under the statutes of rebate, yet it seems that if the penalty of a husband's bond to leave his wife money at his death have been forfeited prior to bankrupty, from the non-performance of any collateral circumstance, equity will permit and arrange the proof of it upon the footing that there is a debt at law (*b*).

What securities given by the husband to or in trust for his wife will and will not be considered in fraud of the bankrupt laws.

No person is allowed by any device to counteract the spirit and intention of the bankrupt laws. *Lord Redesdale*, in ex parte *Murphy* (after stated), said, that although he was bound to decide in favour of a debt whether it were legal or equitable, yet that if it appeared to be a contrivance to *evade* those laws, the debt was not conscientious, and no dividend ought to be paid upon it. As to what will be considered such a contrivance, it is presumed, that upon consideration of all the cases the following distinctions may be established.

A bond with a condition or defeasance to be only sued upon in the event of husband's bankruptcy is fraudulent.

If a bond be given by the husband before marriage to pay a sum of money for his wife's use, with a condition or defeasance not to put it in force except upon his failure, or insolvency, or bankruptcy, such a bond will be fraudulent and void against the husband's creditors, and will not be permitted to be

(*a*) 9 Ves. 110. (*b*) Ex parte Rowlatt, 2 Rose, 416.

proved under his commission (*a*). Upon this point, *Lord Eldon* in ex parte *Cooke* (*b*) expressed himself to the following effect:—"If the husband be to give a bond with condition to pay money, in the event of his bankruptcy, there is great difficulty upon the point whether the demand is not fraudulent against creditors. There have been cases both before *Lords Thurlow* and *Rosslyn*, in which each of them held, that if it were not the case of a settlement of part of the wife's property, but a bond by the husband, it would not do."—In ex parte *Hodgson* (*c*), his Lordship was more explicit, declaring, that if the case before him were to be considered merely as the husband's bond, it would not do.

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And although the bond be connected with articles or a settlement, yet if the wife's property be not the subject of the settlement, and it appear from the instruments that the intention of the parties was to create a debt merely upon the insolvency or bankruptcy of the husband, so as to create a demand out of his estate, such contrivance and securities will be void against his creditors.

So also if the bond be connected with marriage articles or settlement not including the property of the wife, the result will be the same.

Thus in ex parte *Murphy* (*d*), the wife of the bankrupt and her trustees under a marriage settlement, petitioned for leave to prove under the commission £800 under the following circumstances: prior to the marriage a *bond* was given by the bankrupt to the trustees, conditioned for the payment of the above sum on the 3d of *March*, 1796, with a warrant of attorney to confess judgment with a stay

(*a*) Ex parte Hill and ex parte Bennet, 1 Cooke's B. L. 228, (*b*) 8 Ves. 355. (*c*) 19 Ves. 206. (*d*) 1 Scho. and Lefroy, 44. See also Higginson v. Kelly, 1 Rose, 368.

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of execution till that day. At the date of the bond on the 3d of *October*, 1795, a settlement was executed by the bankrupt and his wife and their trustees, referring to the bond, and covenanting that the £800 should be payable and be sued for only *in the event* of the *wife surviving* her husband. And after reciting that the husband was a trader, it was further covenanted, that in case of failing in his circumstances, but not otherwise, the trustees were empowered to enter judgment on the bond, and to issue execution. The bankruptcy was subsequent to the 3d of *March*, 1796, so that the bond became absolute. *Lord Redesdale* said, he considered the whole device a fraud upon the bankrupt laws; and that under the first mentioned covenant the debt was merely *contingent*, and the subsequent provision in case of insolvency, &c. was fraudulent, an attempt and contrivance to make that a debt in case the husband became bankrupt, which could not be so otherwise; that it was a *contingent* demand for £800 payable only if the wife survived her husband, which was the *only* demand that could be made consistently with the agreement between the parties, provided the husband did not become a bankrupt; that such being the nature of the demand, the *settlement* itself showed that it was intended to contrive, what his Lordship conceived to be a fraud upon the bankrupt laws; for a clause in it noticed the husband being a trader, and that it was necessary to secure something in the event of his bankruptcy: for *that purpose* a bond was to be given payable at a day certain, but the sum was not to be recovered from him unless he became insolvent. As to this sum, therefore, though a *legal* demand, yet on the foundation of the settle-

ment if an attempt were made to sue him upon the bond, or to enter up judgment whilst he continued solvent, he would have a right to come into a Court of Equity and prevent it, and to have the contract which was the ground of the bond carried into execution by restraining proceedings on the bond. And his Lordship added, that the debt was to be taken as it stood upon the whole of the instruments executed, and the contract in the deed of settlement was that the bond should have none effect but in case of bankruptcy, for it was *not* the bond that was to operate in the event of the husband dying before the wife, it was *not* the bond that was the security to the wife if she survived, nor to the children if she died before her husband, so that the whole effect of the clause was to avoid the operation of the bankrupt laws. For these reasons his Lordship was of opinion that the debt could not be proved, although he could not make an order upon the petition from the irregularity of the application, which ought to have been by the assignees to expunge the debt.

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In *Higginbotham* v. *Holme* (*a*) the husband, by settlement prior to marriage, conveyed to trustees certain freehold estates to hold after the marriage to the use of the husband for life, *unless* he *should embark in trade*, and *during his wife's life become bankrupt*, and from his death, *or* his being declared a bankrupt, which should first happen, to the use that the wife (if she were the survivor and *B* should be then living) should receive an annuity of £150 during the several lives of herself and of *B*; but if *B* were dead

For husband cannot before marriage settle *his* property so, as by express stipulation with a view to future insolvency, to give his wife in that event any part of his property.

(*a*) 19 Ves. 88.

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at the decease or bankruptcy of the husband, or should die before the wife, then from such death or bankruptcy of the husband, and the death of *B*, the wife should receive an annuity of £200 for life payable quarterly, the *first* payment to be made on the quarter day *next after* the death or *bankruptcy* of the husband. The annuities were declared to be in bar of dower, and the wife's claims upon her husband's real and personal estates, and were to be paid to and for the wife's *separate* use; they were also secured from the death or bankruptcy of the husband by two terms of years created out of his real estates, and subject thereto the ultimate use of the lands was limited to the husband, his heirs, executors, &c. At the marriage the husband was not a trader, nor did he intend to be so, he having been educated for the church, but in 1802 he became a cotton manufacturer, and in *January* 1811 he became a bankrupt, *B* being then living. A bill by the wife claiming the annuity of £150 was dismissed by the Master of the Rolls, from which decree she appealed; and *Lord Eldon* said that the facts were, that the husband at the time of the marriage was not indebted, and had no formed purpose of entering into trade, but having been intended for the church he changed his purpose, entered into trade, and became a bankrupt. The question was, whether a provision of this kind could be sustained against creditors by charging his estate as against their right under the commission with the annuity to which the wife would upon his death have an undoubted title. His Lordship then said, he had vainly endeavoured to apply the principle of those cases which turned upon the fact that a man not indebted nor a trader at the time made a

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settlement *without reference* to debts to be contracted in future, and to the future event of bankruptcy, but that the present case had no resemblance to those; that the present settlement *looked forward* to a change of intention, to the purpose of becoming a trader, and also expressly to the possible consequences of that purpose, and thus looking forward to such a change of purpose and to such consequences, it was a limitation, by the effect of which the estate would go to the creditors, that change being adopted with the *express object* of taking the case out of the reach of the bankrupt laws. And as to the *consideration* from the covenant of the father, which, although it might perhaps prove worth little or nothing, was to be regarded as a consideration with reference to all the provisions of the settlement; and that although an annuity might have been provided by the settlement for the wife in all events, yet it was not competent for a party giving a consideration for a contract which was a direct fraud upon the bankrupt laws to have the benefit of it. His Lordship then said, that he could not assimilate this transaction to the case of the wife's property limited until the bankruptcy of her husband; nor to that of a lease made determinable by the bankruptcy of the lessee, which was a reservation by the owner of the property of a power over it; nor to the case ex parte *Winchester* (*a*) and others, where, as the contingency happened previously to the bankruptcy, the debt was proveable; nor to the case (*b*) put by *Lord Kenyon*, and observed upon by *Lord Redesdale* (*c*),

(*a*) 1 Atk. 116. (*b*) See Staines v. Planck, 8 Term Rep. 389.
(*c*) Scho. and Le Froy, 48.

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of a bond payable immediately and given by a trader upon his marriage to trustees to secure a provision for his wife and children. His Lordship, therefore, confirmed the decree.

But the *wife's property* may be limited by articles before marriage expressly with a view to husband's bankruptcy, so as to determine his interest in it, and to restore it to her against his creditors.

But by articles or settlement before the marriage, the wife's property, in which the husband might have had, if not a bankrupt, either a partial interest with her or a separate one, may be limited to her husband until he become a bankrupt, or insolvent, and from either event to the wife's separate use for life, and after her death to the children of the marriage (*a*). In such a case the subsequent creditors of the husband cannot be considered as defrauded, because the wife whilst single dealt only with her own property in contemplation of the marriage, and she was at liberty to settle it in such manner and upon such terms as she and her intended husband pleased. There is nothing improper in her or her friends providing against the insolvency of the husband, and stipulating for a return of her own property for the support of herself and family in the event of such insolvency, by which he is rendered incapable of performing that duty out of his own. The first authority upon this subject was *Lockyer* v. *Savage* (*b*), which has ever since been followed; and in ex parte *Cooke* (after stated) *Lord Eldon* said that this doctrine ought to be considered as now settled.

In ex parte *Hinton* (*c*), *Fitz* the husband became bankrupt in 1805, and in 1794 by settlement before his marriage with *Elizabeth Randall* £540 (her pro-

(*a*) Ex parte Cooke, 8 Ves. 356. See the form of a settlement containing such a limitation in Append. No. 12. (*b*) 2 Stra. 947.
(*c*) 14 Ves. 598.

perty) were assigned to the petitioner, her trustee, with power to *lend* the money to the husband, and to whom £500, part of it, were advanced upon his bond, dated in *June* 1794, to be repaid on the 18th of *December* then next. The settlement recited the bond, and declared that if the marriage took effect the bond and money should be in trust, that the trustees (of whom the petitioner was the survivor) should, when they thought proper, recover and receive the principal sum, and pay the *interest* to the husband for life, *if he so long continued solvent;* but *if he became a bankrupt*, then to pay the interest to the wife, if she survived him, for life, for her *separate use*, and to her separate receipt, as if she were a *feme sole;* but if she were then dead, then to permit the £500 to be enjoyed by the children of the marriage, but if no children who attained twenty-one, then the bankrupt was to be intitled to it absolutely. The wife died leaving one child, and to prove this debt was the prayer of the petition. And *Lord Eldon* said, that upon the authority of the case in *Strange* (*a*), which had been followed by *Lord Thurlow*, the trustee was intitled to prove this debt upon the *distinction* that this money was part of the wife's property, *not* the bankrupt's. That the case in *Strange* was also an authority that money (the wife's property) might be limited upon the bankruptcy of the husband. That the articles being before marriage the wife was a purchaser for herself and the issue, who could have no remedy against the trustee.

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(*a*) Lockyer v. Savage, 2 Stra. 947.

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So, also, in ex parte *Cooke* (*a*), the wife, amongst other property, being possessed of £10,000, it was agreed, by articles of settlement before marriage, that the sum should be vested in trustees to pay to her separate use £200 a year, and the surplus dividends to the husband, *until he should become bankrupt or insolvent*, and then in trust for her separate use, and after her death for the children of the marriage; but if there were none, then the principal was to belong to the survivor of husband and wife. And it was further agreed, that the residue of the wife's personal estate should be paid to her husband, if living *when she attained* 21, in right of marriage, he first executing a bond, which he covenanted to do, in the penalty of £10,000, conditioned to pay £5000 at the end of six months from the date of the bond. And it was declared that the bond should be to the intent only, that in case the husband should become bankrupt or insolvent, or if he should at his death be insolvent, then the trustees should forthwith put the bond in force, and be possessed of the money upon the same trusts as were declared of the £10,000, except that the husband should not be intitled to the interest for life if he survived his wife, but that the principal should go upon her death, as it would have done on both their deaths; and that no suit should be instituted on the bond, except the husband became bankrupt or insolvent; also, that if he died without having become a bankrupt, &c. the bond should be delivered up, and the £5000 considered part of his personal estate. The

(*a*) 8 Ves. 354.

marriage took effect, and the wife attained 21, and performed her part of the articles. The trustees proved under the commission the £10,000, which, with £5000, the produce from the sale of part of her real estate, and the whole residue of her personal estate, had been received by her husband. And the question was, whether the bond debt of £5000 could also be proved? And *Lord Eldon* determined, that the wife was intitled to prove it, if not for that sum, yet for so much of the residue of the value of the real and personal estate beyond £10,000, as might constitute any part of that £5000. His Lordship said, that whatever inaccuracy there might be in that, the present was a settlement resting in covenant and articles. The marriage was upon an agreement to be carried into execution by future acts; so that if there were any mode of sufficiently providing against bankruptcy, the Court ought substantially to provide against it in the execution of such an article.

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Court of Equity's jurisdiction under articles, so to execute them as to provide against husband's bankruptcy.

It appears from the authorities before stated, that although the wife may reserve a power over her own property, and limit it by articles or settlement, so as to retake it to her separate use, or when lent to her husband, a dividend upon it in the event of his bankruptcy; yet that she cannot effect this object at law by accepting a *bond*, with a condition to create a debt on that contingency; the effect of such a security (excluding the consideration of the policy of the bankrupt laws), being, as it is presumed, to raise no debt prior to the bankruptcy; none such, therefore, as a *legal* debt, is capable of proof, under the commission. But since *equitable* as well as legal demands may be proved, and a bond, although void at law, may be good in equity as *evidence* of a contract, if the husband's

Although husband's bond be void at law, yet if its object appear to have been to secure *wife's property* against husband's failure, the bond will be supported in equity.

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bond contain sufficient to show an agreement concerning the *wife's property* (as in the next case) and that it should be settled, in the event of her husband's insolvency, upon herself and family, a Court of Equity will support it (so far as the wife's fortune was the consideration) in the same manner as we have seen it will do when the transaction is by settlement, or by bond and settlement; the Court making no difference between the circumstance of the specific property being settled or *lent* to the husband (*a*).

Thus in *ex parte Hodgson* (*b*), *William Lowe*, in contemplation of his marriage on the 6th of April, 1805, gave his bond to a trustee, in the penalty of £700, reciting his intended marriage with *Mary Orme;* in consequence whereof, and of *the property which she was intitled to under the will of her father*, it was *agreed*, that after the marriage, in case of the *insolvency* of *Lowe* at any time during their several lives, it should be lawful to *William Bailey*, the trustee on behalf of *Mary Orme*, to come in under any assignment or commission of bankruptcy as a creditor, and to make proof, as well of the sum of £500, as of so much beyond that sum as could be ascertained, that *Lowe* should have received as the distributive share of *Mary Orme* in the personal estate of her father, and receive dividends, &c.; and that the dividends when received should be paid and applied to the only proper use and behalf of *Mary Orme*, and not in any manner to be subject or liable to the debts, power, or control of her husband; and that *Lowe*, if his wife survived him, should leave by

(*a*) 8 Ves. 357. 1 Buck, 187. (*b*) 19 Ves. 206. See also ex parte Young, 1 Buck, 179.

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will, or give by settlement, an annuity of £50 to her for life; and in case of children, should give so much of her fortune as he should have received, among them equally, and declaring the condition of the bond accordingly. *Mrs. Lowe* was intitled to a legacy of £500 under her father's will, and to £80 under the will of her brother, who bequeathed the residue of his personal estate equally among his sisters. Both sums were received by *William Lowe*. On the 28th of *August*, 1811, a commission of bankruptcy issued against *Lowe*. The trustees attempting to prove the £500 and £80, a claim was admitted; and the petition, presented by the assignees, prayed, that it might be expunged; and *Lord Eldon* decided that the £80 could not be proved. And with regard to the other sum, he said, he never saw such a security, it not providing that it should be forfeited if the party became insolvent; on the contrary, that it was a bond in a certain sum, with a condition, that if the husband became insolvent, the party should prove and receive dividends under any commission of bankruptcy; that he looked upon it as a *marriage agreement*, that the property of the wife, payable on her marriage, and to which she might become intitled from her father, was what the husband was to have the use of until his bankruptcy or insolvency. His Lordship said, that if the stipulation were that the husband should possess his wife's estate, subject to return it in case he became a bankrupt, that would do; for it was clear in that Court, that her estate might be limited to him until he became bankrupt. The Court's declaration was, that proof of the £500 might be admitted; although *in form* a bond, it was an *agreement* as to her estate, that it should be en-

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joyed by the husband till he became a bankrupt, and was to be considered, therefore, as a limitation of her estate until his bankruptcy. The claim of the £80 was struck out.

Power of a Court of Equity to correct a *settlement* on internal evidence, when from mistake it is incompetent to secure wife's property upon her husband's insolvency.

In *ex parte Cooke*, before stated, *Lord Eldon* alluded to the power of a Court of Equity so to execute articles, or an executory agreement, as, consistently with the intention of the parties, to provide substantially against the husband's insolvency; but whether the Court had such a power to alter or modify a settlement, a *deed executed* and *complete*, and having nothing executory about it, in order to effectuate such intention, seems to have been doubted previously to the year 1810, when, for the purpose of settling the question, *Lord Manners*, Chancellor of *Ireland*, consulted *Lords Eldon* and *Redesdale* upon the following case, whether, when it appeared that the intention, upon executing a settlement, was that the fortune of the wife should be a provision for her, but by *mistake* it was *made to appear* the property of the husband, it was their Lordships' opinions, that the deed of settlement could be so far corrected to meet the intentions of the parties, as to amend the *mistaken form* of the deed, and mould it so as to be a valid settlement? Both opinions having agreed in the power of a Court of Equity to make such correction and alteration, *Lord Manners* acted upon them, and the point appears to be now so settled (*a*).

(*a*) Higginson v. Kelly, 1 Ball and Beat. 253—256. Ex parte Verner, ibid. 260.

CHAPTER XVI.

THE DISABILITIES OF COVERTURE, AND THE EXCEPTIONS TO THEM.

THE subjects treated upon in this chapter, are

I. *The execution of* powers *by the wife, their kinds, and the suspension and merger of them.*

II. *The surrender of leases by her without levying a fine.*

III. Purchases *by her of real property; her receipt and payment of money, and her competency to negotiate or alter securities.*

IV. *The husband's liability to answer for* debts *contracted by his wife for necessaries, and his exemptions from the obligation of maintaining her, and*

V. *Of her own responsibility in such cases; and of her suing and being sued as a* feme sole; *also the peculiarities attending her situation when a* feme sole trader *of the City of London.*

The disabilities attending marriage are created by policy of law, for two reasons; first, to prevent, so far as can be by human precaution, the regard which the wife is supposed to entertain for her husband, and his influence over her, from stripping her of all her property during the marriage; and secondly, to exempt the husband from her acts and engagements to which he was not privy and consenting; for if she

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(who of the two is reasonably presumed to be the most exposed to imposition) were allowed to bind the husband by her *sole* acts, the consequences might prove ruinous to both of them and their family. Upon this principle it is (as before appears (*a*)), that the wife is not permitted to take upon herself the office and responsibility of an executrix or administratrix, without her husband's concurrence. The same principle also founded this general proposition, that the *sole* deeds of married women are void (*b*).

Distinction when a deed as an escrow is delivered by a woman *before*, and when *after* marriage.

If, therefore, a married woman execute and deliver a deed to a person as an *escrow*, and the husband die, and then the grantee perform the condition upon which the person to whom the deed was delivered gives it to the grantee as the woman's deed, it is void (*c*); and for this reason, because the instrument receives its inception from the first delivery, and its completion upon performance of the condition; and the *second* delivery is merely the execution and consummation of the first (*d*), so that the grantor or donor being under the disability of coverture at the time of the *first* delivery of the deed, the subsequent death of the husband, before the compliance of the grantee or donee with the terms of it, will not remedy the original defect; but if the wife had been single at the period of the first delivery, and afterwards, but before the grantee or donee complied with the conditions upon which it was to be his deed, she took a husband, the marriage would not defeat the deed; for the instrument commencing in effect from the

(*a*) Vol. i. p. 185. (*b*) Perk. sect. 6. (*c*) Perk. Sect. 11. (*d*) 5 Rep. 84 *b*.

first delivery amounted by relation to the deed of a *feme sole* (*a*).

Except by fine or recovery (as has been noticed in a former part of this work (*b*)), a married woman is not allowed, by the general common law, to part with or incumber her own freehold estates, nor to give up any interest which she has in her husband's real property. And although the wife is in most cases a necessary party to the instrument affecting her estate, yet if she join with her husband in levying a fine, or suffering a recovery (*c*), and be no party to the instrument declaring or leading to the uses, she will nevertheless be bound. One of the points decided in *Beckwith*'s case (*d*) was to the above effect; viz. that if husband and wife levy a fine of real estate, the property of the wife, and the husband *alone* declare the uses, the declaration will bind the wife if her dissent do not appear; for it will be inferred, that when she joined with her husband in the fine, she also agreed with him in declaring the uses of it.

Wife joining in a fine or recovery, is bound by the deed leading or declaring the uses, though no party to it.

I. It seems to be a natural deduction from the principles upon which the disabilities of coverture are founded, that those cases must be excepted out of the general rule, in which the interests of the husband and wife are not in the least affected by her separate acts.

As to execution of *powers* by wife over *real* estates which do not affect her interest.

She may, therefore, execute a mere *authority*, whether it be given before or after marriage, for that has no operation upon any interests belonging

(*a*) Perk. sect. 9. (*b*) Vol. i. p. 138. (*c*) Lusher v. Bambong, Dy. 290; *a*. (*d*) 2 Rep. 57. See also Swanton v. Raven, 3 Atk. 105.

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either to herself or to her husband, and she is no more than the *instrument* of another person; so that a power given to her to convey another's estate, may be executed by her without her husband's concurrence, and even in his favour (*a*); or he may join with her in the execution of a power given to her (*b*), unless the power require her execution of it *dum sola* (*c*). In the exercise of this authority, the wife, as a *feme sole*, may do every necessary act; for whatever she is obliged to do, will be considered, not as her own, but as the acts of her principal; and when such power is given to her *dum sola*, or when married, a subsequent marriage will not suspend it (*d*).

Husband's concurrence unnecessary,

and the wife alone is competent to do all necessary acts for executing the powers.

When wife has an interest in the estate distinct from the power, she may alone execute the power.

When both an *interest* and an *authority* pass to the wife, if the authority be collateral to, and do not flow from the interest, she may execute the authority *alone*, because the interest and the authority are distinct, and to be considered the same as if they were in different persons. As instances of the above several propositions,

Instances.

If lands be given to a woman whilst single, who afterwards marries, or during her marriage, upon *condition* to sell or to convey them to another person, she alone may perform the condition (*e*). The law is the same of a *power* as before mentioned; so that if under a deed or will the wife take as tenant for life, with a general power of appointing the fee, she may make the appointment alone, for neither she nor her husband have any beneficial interest in the in-

(*a*) 2 Ves. sen. 610. (*b*) Bayley v. Warburton, 2 Com. 494, 496. Tomlinson v. Dighton, 1 P. Will. 149. (*c*) The Marquis of Antrim v. the Duke of Buckingham, 1 Eq. Ca. Abr. 343, pl. 4. (*d*) Burnett v. Mann, 1 Ves. sen. 156. (*e*) 2 Roll. Rep. 68. Br. Cui in vitâ, pl. 15, and Dev. pl. 12.

heritance, and the appointee takes the estate under the deed or will (*a*). Again,

Execution of, by wife.

If the wife be tenant for life, with remainder to such uses as she shall appoint, and in default of appointment, to herself in fee, she *alone* may by appointment *defeat* her own remainder; but she cannot, by an instrument independent of her power, convey away her remainder without the concurrence of her husband in a fine or recovery (*b*). Upon the same principle, if she be tenant for life, with a power of leasing, she *alone* may exercise the power (*c*), but she cannot, without a fine, *grant* such a lease or leases, if she have not resort to the execution of her power.

As to wife's execution of a power over lands when under age.

Suppose the wife to be under age, she may nevertheless execute a mere power that does not affect her interest: to this effect *Lord Hardwicke* expressed himself in *Hearle* v. *Greenbanke* (*d*); "When an infant," said his Lordship, "is a mere instrument or conduit pipe, and his interest is not concerned, he may execute the power delegated to him. Before the statute of *uses*, the power was over the use; therefore, all things necessary to be done over legal estates, were done by way of conditions, and this was the method of exercising an authority over the legal estates; and at law an infant might perform a condition where it was for his benefit." But it seems that no power, except that of the legislature, can enable an infant to part with any interest which it has in freehold property.

With respect to the extinction of powers, their

(*a*) Daniel v. Uptoh, Noy's Rep. 80. 1 Sir W. Jones, 137. 1 P. Will. 149. (*b*) 2 Ves. sen. 191. (*c*) See 2 Com. Rep. 496. (*d*) 3 Atk. 710.

Powers.

As to their extinction, suspension, and merger.

suspension and merger, the following propositions appear to be authorised by the cases, and are necessary to be adverted to, as applying to powers granted to the wife, or to her and her husband.

Of powers collateral.

When the person to whom the power is given takes *no* interest in the estate, nor had any at the time when the power was created, the power is termed *collateral* to the estate; and neither the owner of the lands, nor the donee of the power, can by fine, feoffment, recovery, or otherwise, destroy such power.

Accordingly, if husband or wife have a power to sell the estate of *B*, or to revoke the uses which had been declared of it; the power may be executed, although the owner of the estate, or the donees of the power, had previously levied a fine, or suffered a recovery of the lands, because the power is quite distinct from and independent of the estate (*a*).

Of powers in gross.

When the grantee of the power takes an *interest* in the property as for life, with authority to appoint the estate after his or her death among such of the children of *B* as he or she may think proper, or to create a term to raise portions for younger children, or to jointure a wife after his death, &c. these powers are called powers in *gross*, and do not affect the interest of the tenant for life, nor arise out of it, so that they may be exercised although the appointor previously part with such interest for life by lease and release, or other conveyance, which from their natures do not destroy or displace the whole of the old estate and all its incidents (*b*); but it is presumed

(*a*) Willis v. Shorral, 1 Atk. 474. Co. Litt. 265 *b*. Digges' case, 1 Rep. 174. (*b*) Edwards v. Slater, Hard. 410. Phitton's case, cited Hard. 412.

that if the grantee make a feoffment, levy a fine, or suffer a recovery, previously to the execution of such powers, those acts will destroy them (*a*); and that a release, properly framed for the purpose, will have the same effect (*b*). But the *acceptance* of a feoffment by tenant for life will not extinguish any of these powers, for they were not in the feoffor to destroy; and if an appointment be made after such acceptance, the estate created by the power will be reduced upon the entry of the person in remainder (*c*). Also if the execution of the power be made by deed and fine, the fine will not extinguish it, for the deed and the fine will be considered as one transaction and assurance, and operate as an execution of the power (*d*). And it is immaterial whether the deed be prior or subsequent to the time when the fine was levied (*e*).

POWERS.

As to their extinction, suspension, and merger.

Another instance of a power in gross is where the settlor, at the time of creating the power, reserves to himself an authority to revoke all the uses, and takes no other interest in the estate. If he levy a fine to the tenant for life, the power will be released and extinguished (*f*).

If an estate for life be limited to a stranger, with a power of revocation, or a power to grant leases in possession, or to make an immediate charge upon the property, such powers are denominated *appendant* or *appurtenant*, because they append or belong to the particular estate for life, and operate upon or in

Of powers appendant or appurtenant.

(*a*) Saville v. Blacket, 1 P. Will. 777. King v. Melling, 1 Ventr. 225. Hard. 416. (*b*) Albany's case, 1 Rep. 110 *b*. 2 Atk. 567. (*c*) Hard. 417. (*d*) Thomlinson v. Dighton, 10 Mod. 71. (*e*) Wigson v. Garret, 2 Lev. 140. Raym. 239. 1 Ventr. 278. S. C. Herring v. Brown, 2 Show. 185. (*f*) Bird v. Christopher, Sty. 389.

POWERS.

As to their extinction, suspension, and merger.

respect of it. Whatever, therefore, affects the estate for life must also affect such powers; so that when the power is to revoke the uses, but instead of doing so, the tenant for life creates a charge, lease, &c.; such acts, although not an execution of the power, will take effect out of his interest for life; and he will not be permitted to defeat them by an execution of his power, but subject to them he may execute it (*a*). And if he, by any means, part with his whole estate, the power will be destroyed, for the interest must share in the fate of the principal; so that a conveyance by tenant for life of his estate, to which is annexed a power of leasing in possession, or a conveyance or disposition of it by operation of law, as in the case of bankruptcy, &c. will extinguish such power (*b*). But in *Ren* v. *Bulkeley* (*c*), the Court held that the conveyance of the life-estate to a trustee and his heirs upon trust to apply the profits in payment of an annuity to *B*, whilst the tenant for life lived, and the surplus to himself, was not an extinguishment of the power. This case is a *legal* decision upon an *equitable* principle, viz. that although the whole legal estate for life was transferred, yet as it was so, for the purpose only of letting in a *particular* charge, it should not have the *legal* effect of extinguishing the power. But however just this decision might be in a Court of Equity, it seems difficult to support it in a Court of *Law* (*d*).

Another instance of a power appendant is when

(*a*) Goodright v. Cator, Dougl. 477. Yelland v. Ficklis, Moor's Rep. 788. (*b*) Cooke v. Bromehill, Noy, 66. Lofft. 71. (*c*) Dougl. 292. Sed vide Vincent v. Ennys, 3 Vin. Abr. 432, pl. 10. (*d*) See vol. i. p. 135.

As to their extinction, suspension, and merger.

the inheritance is limited to *A* in default, and until the execution of a power given to him to appoint the fee to such uses as he may think proper. If, therefore, *A* convey away his interest, the power will be gone, because he having the ultimate limitation in fee vested in him subject to the power, and being at liberty either to dispose of it by appointment, or as owner of the fee, if he chose the latter he cannot afterwards execute the former; and if the conveyance be by fine or recovery, the power becomes extinct by the effect of those acts (*a*). But when the ultimate limitation in fee is not executed in *A*, as where his estate for life is *legal*, and the power is to appoint to uses, and the estate subject to the power is vested in trustees upon *trust* for his right heirs; there, as the heir must take the ultimate limitation as a purchaser, *A* can only defeat it by a due execution of his power; and if he part with or destroy his estate for life, the power will be extinguished (*b*).

Merger.

Great difference of opinion has prevailed upon the *merger* of the power when the fee subject to it was limited to the donee of such power. Some of the cases have determined that the power merged in the fee (*c*); while others that the fee vested in the donee *sub modo*, viz. subject to be devested upon a due execution of the power; and this appears to be the right determination (*d*). The ground of the former opinion was that the power and the fee could

(*a*) Penn v. Peacock, Forrest, 41. (*b*) Parkes v. White, 11 Ves. jun. 209. (*c*) Cross v. Hudson, 3 Bro. C. C. 30. Goodill v. Brigham, 1 Bos. and Pull. 192. (*d*) Clere's case, 6 Rep. 17 *b*. Cox v. Chamberlain, 4 Ves. jun. 631. Roach v. Wadham, 6 East. 289. Maundrell v. Maundrell, 10 Ves. jun. 246.

POWERS.

As to their extinction, suspension, and merger.

not subsist together in the same person. The principle of the latter case is, that there is no impropriety in holding that the power and the fee may remain distinct, for that a power being an authority to be exercised through the medium of the statute of uses, when it is executed, the appointee takes under the instrument creating such power, as if he had been originally named in it, and not under the appointor to whom in default of appointment the fee is limited; but supposing the power not to be executed, the person claiming the fee limited to the donee of the power in default of his appointment, either by conveyance from him or as his heir, derives all title to it from such donee, as to the inheritance of any other estate which belonged to him. It appears, therefore, that the power and the fee may well subsist together without being merged. This distinction is exemplified by *Lord Eldon* in *Maundrell* v. *Maundrell* (*a*). "When (said his Lordship) a vendor recites his power, executes it, and conveys by feoffment bargain and sale, or lease and release, he professes both to execute his power and pass his interest. Suppose the lease for a year was not executed, having been forgotten, or it had not a proper stamp, the release would have no operation, but the *execution* of the *power* would have limited an use to the persons named, and the use would ingraft itself upon what *Mr. Booth* calls *scintilla juris* in the releasees; and the persons named in the execution of the power would have taken precisely as if they had been persons to whom uses were limited in the original deed. Take the ordinary case of a marriage settlement, with

(*a*) 10 Ves. 255.

a power to the tenants for life of leasing during minority. A power in the tenant for life to lease for twenty-one years is almost as inconsistent with his interest as a power to limit the fee with that of tenant in fee. But when the tenant for life executes the power, the effect is *not* technically making a lease, but that lessee stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years antecedent to the life estate and the subsequent limitations."

WIFE'S SURRENDER OF LEASES WITHOUT LEVYING A FINE.

If, therefore, an estate were given to a married woman in fee with a power, annexed to or preceding such limitation (*a*), to dispose of the fee as a *feme sole*, such power would be valid, and upon the execution of it the fee which till appointment vested in her would be devested (*b*).

II. The like principle which induced the legislature to interfere and authorise the granting of leases of the wife's estate for three lives or twenty-one years (and before considered (*c*)), has influenced the same power to remove the disability of coverture in instances when the wife is seised or possessed of leasehold property for lives or for years, so as to enable her, or any other person on her behalf, to surrender the old and take new leases, without the expense of levying a fine. In order to effect these purposes it is enacted by statute 29 George 2 (*d*), that in all cases where a married woman was, or should become intitled to, or interested in any lease or leases for life or lives, or for years determinable

Wife empowered to surrender old and take new leases without a fine levied by her.

(*a*) 4 Term Rep. 177. (*b*) Abbot v. Burton, 11 Mod. 181. And see further upon Powers, chap. 19. (*c*) Vol. i. p. 93. (*d*) Chapter 31.

WIFE'S SURRENDER OF LEASES WITHOUT LEVYING A FINE.

upon a life or lives, or for years absolutely, she, or any person or persons on her behalf, might apply to the Courts of Chancery or Exchequer, or to the other Courts of Equity in England, or of Great Session of the Principality of Wales, by petition or motion; and that, by the order and direction of any of those Courts, she might by *deed* only, without levying a fine, *surrender* such lease or leases, and accept and take in her own name, and for her own benefit, a *new* lease or leases during such number of lives, or for such number of years determinable upon lives, or for such number of years as were mentioned in the lease or leases surrendered at the making thereof respectively, or otherwise as those Courts should direct. And the act declared that the fines for renewal, and the incidental charges should, unless otherwise paid or secured, be, together with interest, a charge upon the leasehold premises, for the use and benefit of the persons advancing the same; and that the renewed leases should operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions as the surrendered leases. And it was also declared that every such surrender, and the leases granted thereupon, should be as legal and valid, as if such surrender had been made by or on behalf of a person unmarried (*a*).

As to purchases by wife of real property.

III. So jealous is the law lest the wife by any act should occasion injury to her husband, that it disables her from binding him without his privity and concurrence with any contract and its consequences. If, therefore, she purchase an estate without her husband's knowledge, and he afterwards disagree to

(*a*) See the form of such a surrender in Append. No. 13.

it, he may recover the purchase money from the vendor in an action of *trover* (*a*); but his assent to the transaction will confirm it so far as he is interested; yet after his death, if the wife survive him, or if she make no election, and die before him, her heirs may disaffirm the purchase; so that her right of election is transmissible to the persons or person claiming by descent from her: and it must be noticed, that the wife is a person by law enabled either to purchase or to accept an estate; therefore, subject to the approval or disagreement of her husband, it vests in her in the mean time (*b*). Upon the same principle, if the husband make an exchange of his wife's lands, she or her heirs may avoid it after his decease (*c*). Her election in regard to leases, &c. granted of her estate, has been noticed in a former part of this work (*d*); and if the wife, after her husband's death, enter upon the estate made to her during the marriage, and take the profits, that will be an assent and confirmation (*e*).

WIFE'S PURCHASE OR ACCEPTANCE OF LANDS.

Their validity depends upon husband's assent or dissent.

Wife may avoid the purchases by dissent after his death,

or may confirm them.

The same reason, which induces the law not to allow the wife to affect her husband by the purchase of lands without his consent, occasions also her incapacity to receive or dispose of money without his concurrence.

Wife's receipt and payment of money, void against her husband,

Accordingly, payment of a legacy bequeathed to her generally, and not given to her separate use, will be a void payment as to her husband (*f*); and the law is the same in regard to rent, money, &c. (*g*).

(*a*) Granby v. Allen, 1 Ld. Raym. Rep. 224. Comberb. 450, S. C.
(*b*) Co. Litt. 3. (*c*) Co. Litt. 51. 1 Roll Abr. 811.
(*d*) Vol. i. p. 90. (*e*) 3 Rep. 26 *a*. (*f*) Palmer v. Trevor, 1 Vern. 261. (*g*) 2 Wils. 3. Tracy v. Dutton, Palm. 206.

WIFE'S RECEIPT AND PAYMENT OF MONEY, AND GIVING OR NEGOTIATING SECURITIES.

except she act under his authority, express or implied, and receive money by his desire.

Neither can she release a debt, nor give or negotiate any security.

But the wife may act as her husband's agent or attorney. If, therefore, he authorise her to receive and pay money, or if she be accustomed so to do with his permission (which is an implied authority), he will be bound by such her acts (*a*).

So, also, if the husband desire money to be *lent* to his wife, payment of it to her will bind him; and he will be liable to make satisfaction to the creditor in an action of *assumpsit* (*b*); because this amounts to an express contract by the husband to pay the money, and an assent that the wife should receive it.

The law, with the same view of protection to the husband, as before noticed, disables his wife, without him, to suspend, alter, or release any debt made payable to herself generally, or to give, indorse, or assign a promissory note or other security.

Thus, in *Rawlinson* v. *Stone* (*c*), *Dennison*, J., said, that if a note of hand were made payable to a single woman, who afterwards married, she could not indorse and assign it; and he cited a case of *Connor* v. *Martin* (*d*), of which he had taken a note: it was an action by the indorsee of a promissory note payable to *Susan Connor* or her order, and given to her before marriage, and which, after marriage, she indorsed to the plaintiff. The defendant pleaded that *Susan* was married at the time of making the indorsement. The plaintiff demurred, and the question was, whether the plaintiff could maintain the action upon the note indorsed by a married woman? The whole

(*a*) Palm. 206. Seaborne v. Blackstone, 2 Freem. 178. (*b*) Stephenson v. Hardy, 3 Wils. 388. (*c*) 3 Wils. Rep. 5. (*d*) In C. P. Easter, 8 Geo. 1.

Court were of opinion that the wife could not assign the note, because by the act of law it became the sole right and property of the husband.

WIFE'S RECEIPT AND PAYMENT OF MONEY, AND GIVING OR NEGOTIATING SECURITIES.

And in *Brown* v. *Benson* (*a*), the defendant and another person gave a bond to the plaintiff (the husband), conditioned to pay to his wife an annuity of £26 quarterly for eleven years. The plaintiff being in embarrassed circumstances, left this country shortly after the date of the bond; and the obligors having advanced on his account money to the amount of £25, 5*s*., they, during the husband's absence, agreed with his wife, that she should give up five years' annuity, and consider it as paid for that period in satisfaction of the advancements; and she signed a receipt accordingly. The jury found that the advancements were made for a debt of the plaintiff, and for his benefit. The question was, whether this agreement between the wife and the obligors was binding upon the husband? and the Court held in the negative; because the bond had no further operation than to give the wife an authority to receive the payments as they became due, which she could not transfer nor anticipate.

If, however, the wife be accustomed to sign instruments for her husband, or with his permission, it seems that the law (as before mentioned) will presume that she acted as his agent in other similar cases; and then such acts will bind him (*b*).

IV. The law, with a view to the safety of the husband, further disables the wife from making any

(*a*) 3 East, 331. (*b*) Bowyer v. Peake, 2 Freem. 215.

HUSBAND'S LIABILITY TO WIFE'S CONTRACTS FOR NECESSARIES.

personal contract or incurring any debt to bind him without his concurrence or authority (*a*). But there are exceptions to this rule.

Wife disabled to contract to bind her husband without his authority.

1. One exception arises from the circumstance of their cohabitation. If, therefore, whilst husband and wife live together, she order goods, the *primâ facie* presumption will be, that she did so as her husband's agent or attorney (*b*); and the more particularly so, if she have been permitted by him to purchase articles for the use of the house and family (*c*). Indeed, either the express or implied authority of the husband is the test by which all cases must be determined in regard to the husband's liability to answer for his wife's engagements whilst they cohabit; for a married woman cannot make any contract to bind her husband, except by his express or implied authority (*d*).

When such authority implied.

For necessaries.

Upon this principle, since the husband is bound to supply his wife and family with necessaries, such as lodging, clothes, and subsistence, if she, therefore, contract for, or purchase necessary food and apparel, whilst living with her husband; or if she incur debts for her own necessaries, when he neglects to provide them, whilst they cohabit; his authority to her, as his agent, to procure them for her own use, will be implied by the law, and he will be obliged to pay for them (*e*).

(*a*) Gilb. Law of Evid. 183. 4 Leon. 42. 15 East, 607. (*b*) Bull. N. P. 134. Langfort v. Tyler, Salk. 113. (*c*) 1 Sid. 128. (*d*) Marshall v. Rutton, 8 Term Rep. 545. (*e*) Dier v. East, 1 Ventr. 42. Beaumont v. Weldon, 2 Ventr. 155. Manby v. Scott, 1 Bac. Abr. 488. 1 Sid. 109, S. C. 1 Roll Abr. 351, pl. 5.

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But this implication or assumption will be repelled if, whilst husband and wife live together, the articles purchased by the wife are not such as can be classed amongst those which may be considered necessaries; so that, in the absence of the husband's express authority, it appears requisite to prove, with a view of fixing liability upon him, that in other instances of the like kind the wife was in the habit of purchasing similar articles with the concurrence of her husband (*a*); for if the goods are unsuitable to her rank in life, either in kind or quantity, and to her husband's circumstances, his authority for the contract or purchase will not be implied. But what will be considered necessaries, exclusive of board and lodging, are such articles as comport with the wife's situation in life and her husband's fortune, and which are usually worn or possessed by persons in similar conditions of life.

If suitable to her and husband's circumstances.

What considered to be necessaries.

Thus, in *Berreblock* v. *Michael* (*b*), it was objected against the consideration, because the declaration was, in regard to *Lord Burgh* (the husband), that he was indebted to the plaintiff in *£25* for *plate* sold and delivered to *Lady Burgh*, to *his* use; but that there was no averment that the husband agreed thereto, or that it came to his use. But as the plate was *necessarily* to be intended to have come to the husband's use, or to have been bought with his consent, the Court overruled the objections.

Medicines, medical attendances, and reasonable expenses incurred during illness, fall within this exception (*c*); and the determination of each parti-

(*a*) Morton v. Withens, Skin. 349. (*b*) Cro. Jac. 257, 8.
(*c*) 1 P. Will. 483.

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cular case, as to what are and are not to be considered necessaries, belongs to a jury.

If the articles bought be not necessaries, yet if they come to husband's use, &c. he will be liable.

2. Another exception to the rule, in respect of the wife's disability to contract, happens when the goods purchased by her (to the payment for which the husband would not be liable) come to her or her husband's use with his knowledge and permission, or when he allows the wife to retain and enjoy them. In such cases the law considers the wife as her husband's agent, and implies a promise on his part to pay for the articles. So also when the husband permits his wife to assume an appearance beyond his ability to support, the like authority and promise will be presumed (*a*).

As he also will be in equity (although not at law) if the wife borrow money to pay for necessaries.

3. A third exception is, when the wife purchases necessaries and pays for them with *money borrowed* by her, from a stranger, for the purpose. Although at law, as appears from the case of *Earle* v. *Peale* (*b*), such a loan could not be established against her husband, yet upon proof of the money having been properly applied, a Court of Equity will interfere, and allow the creditor to stand in the place of the persons, who actually supplied her with the necessaries, to receive satisfaction against the husband, to the value of the articles proved to have been delivered to her (*c*).

Or if he turn her out of doors, or oblige her to leave him.

4. And a fourth exception occurs when the husband, in breach of his duty, turns his wife out of doors, without provision, and without a sufficient cause; or when he, by cruel treatment (*d*), obliges her

(*a*) Waithman v. Wakefield, 1 Campb. Rep. N. P. 120. (*b*) 1 Salk. 387. (*c*) Harris v. Lee, 1 P. Will. 483. (*d*) See Horwood v. Heffer, 3 Taunt. 421.

to leave her home. In such cases his liability to answer for her necessaries follows the wife; because the law will not allow her husband to devest himself of this duty to maintain her by such improper methods; it therefore continues his implied authority and consent, that she should make for him such contracts as are requisite for supplying her necessities (*a*).

HUSBAND'S LIABILITY TO WIFE'S CONTRACTS FOR NECESSARIES.

5. We shall now consider the circumstances which will discharge the husband from his obligation to keep and maintain his wife. The husband will be exempt from this duty in all cases when the nature of the transaction is such as to preclude all possibility and even propriety to raise an implication that the wife acted under his authority.

Thus, if the wife leave her husband's house of her own accord, and without a sufficient provision, the law, for want of cohabitation (which is the foundation of his liability to support her), cannot continue the implied authority from him to her to purchase necessaries, which from her own act he was not bound to furnish (*b*).

But husband's liability ceases if wife leave him without sufficient reason,

Yet if, during her absence, she conduct herself with propriety, and offer and submit to return to her husband, and he refuse to receive her, then, according to the opinions of some persons, debts contracted by her from that period for necessaries

which, according to some opinions, will revive if he refuse to receive her upon her offer to live with him.

(*a*) 1 Salk. 118. 3 Wils. 389. Bolton v. Prentice, 2 Stra. 1214. Thompson v. Hervey, 4 Burr. 2177. (*b*) Etherington v. Parrot, 2 Ld. Raym. 1006. Longworthy v. Hockmore, cited 1 Ld. Raym. 444. 1 Sid. 130. 1 Keb. 480.

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will bind him; the implied authority for that purpose, which the law had suspended, being revived (*a*).

But *semble*, that husband's liability will not be revived before renewed cohabitation.

These opinions, however, may be doubted; for since the wife, by her own voluntary act, discharged her husband of his obligation to maintain her, by unnecessarily quitting his house without his consent, it is but reasonable that his liability to support her afterwards should not be revived by implication without his express concurrence in consenting to his wife's return to his protection, or until their cohabitation was restored either by mutual agreement, or by the sentence of the Ecclesiastical Court.

When wife leaves her husband's house he ought to give notice to tradesmen of the fact, &c.

But until it has become notorious that the wife has withdrawn herself from her husband's care and protection, his liability to engagements for necessaries will, as it seems, continue; so that he ought to give *particular* notices to tradesmen not to give her credit upon his responsibility. The propriety and necessity for such notices are apparent from the secrecy attending the wife's departure, and the improbability of her elopement being generally known until some time afterwards; but proof by the husband of the creditor's knowledge of the wife's departure and living separately from him, will protect him against the demand (*b*).

Elopement and adultery of wife a discharge to husband.

As the wife's departure from her husband without a sufficient reason exempts him from the duty of supporting her, it follows, that her elopement, ac-

(*a*) 1 Sid. 129. 1 Keb. 365. Child v. Hardyman, 2 Stra. 875. 1 Mod. 131. 1 Lev. 4. (*b*) 2 Ld. Raym. 1006. Todd v. Stokes, 12 Mod. 245. 1 Ld. Raym. S. C. 444. 1 Mod. 124. 1 Sid. 127—8. 1 Bosanq. and Pull. 226. Hinton v. Hudson, Freem. Rep. 248.

companied with *adultery*, will discharge him from all obligation to find her necessaries, and consequently he will not be bound by her contracts for them (*a*); for, under such circumstances, it would be unreasonable to continue the implication of his authority to her to procure necessaries; and, in such an aggravated case, his refusal to take her again will not revive his obligation to maintain her.

HUSBAND'S LIABILITY TO WIFE'S CONTRACTS FOR NECESSARIES.

It may, however, happen that the wife after being under the necessity of leaving her husband from his misconduct (in which case his liability to support her continues), may, by her own act, discharge him from his obligation to find her necessaries. This will occur if, after she has been turned out of doors by her husband without sufficient reason, she commit adultery.

And her adultery *after* being turned out of doors will discharge husband from her support from the time of her misconduct.

Thus, in *Grovier* v. *Hancock* (*b*), the demand was for the wife's board and lodging, and it appeared that her husband had *first* misconducted himself, and committed adultery with a woman whom he brought home, and that he afterwards ill-treated his wife and turned her out of doors. It was also in evidence that she, after being so expelled, committed adultery, and at last *offered* to return home; but her husband would not receive her. The Court was of opinion that the plaintiff could not recover his demand against the husband, and said, that although the precise case did not appear to have been before controverted, the probable reason was, that the point had not been doubted, and that it must be governed by the same principle upon which it had been determined that the

(*a*) Morris v. Martin, 1 Stra. 647. Manwaring v. Sands, 2 Stra. 707. (*b*) 6 Term Rep. 603.

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husband was not liable in cases where his wife went away with an adulterer; that the rule was not modern, but was mentioned by *Lord Coke* in regard to dower (*a*); that the question was, whether the necessaries were provided *before* or *after* she had committed adultery? If *after*, the action could not be maintained, and that in the present case if the wife had instituted a suit in the Ecclesiastical Court against her husband for a restitution of conjugal rights, that Court would not have assisted her.

An exception to the rule that wife's adultery shall discharge her husband from supporting her.

But each case depends upon its own particular circumstances; and an instance may occur in which the adultery of the wife will not discharge her husband from his obligation to maintain her. Suppose, then, the wife to have committed adultery for some time in her husband's house, and unknown to him; but that so soon as he became acquainted with the circumstance, he, instead of turning her out of doors publicly, leaves his own house, and permits her to continue in possession of it with the adulterer; in such a case it is expedient for the safety of the public, and their dealings one with another, that the implied authority of the husband to his wife to purchase necessaries should not abruptly determine, so that in this instance, until their separation and her misconduct become notorious, her husband will be liable to the creditor for necessaries.

This point was determined in *Norton* v. *Fazan* (*b*). The plaintiff brought an action against the husband for necessaries sold to his wife and children, and it appeared that some time before the delivery of the

(*a*) Co. Litt. 32. (*b*) 1 Bos. and Pull. 226.

goods, the husband having discovered that his wife kept up an adulterous intercourse with another man, quitted her, leaving her in possession of his house, with two children bearing his name, and in which house the adultery was carried on. The wife was without a regular provision. The Court decided that the plaintiff was intitled to recover, because the wife was permitted to remain in her husband's house with her children, in which she had been placed by him, and was consequently enabled to procure goods upon his credit. But *Eyre*, C. J., said, that if the husband, in any other action, should be able to establish the *notoriety* of his wife's situation, he might defend himself; or that if he should be able to prove that the plaintiff in such action *knew*, or *ought* to have known the circumstances under which the wife was living, he might perhaps be able to prevent another verdict passing against him. *Buller*, J., made the following remark: "the wife committed adultery for a considerable time whilst she was living with her husband, and he voluntarily yielded his bed to the adulterer, and made no provision for her. What colour of defence is left? Knowing of her criminal conduct, and having made no provision for her, he *must* maintain her as before."

WIFE'S PERSONAL LIABILITY FOR NECESSARIES.

V. Suppose, then, the husband's obligation to support his wife to cease by her leaving his home, and that she is without any provision; it may be asked, who is to be answerable for her necessary debts and engagements? The argument in favour of her personal responsibility is, that when the husband ceases to be her protector, and is not liable to have any claim made upon him for her support and maintenance, it follows of necessity that she must

When husband is discharged from his obligation to maintain his wife, yet she cannot contract so as to make herself *personally* liable,

WIFE'S PERSONAL LIABILITY FOR NECESSARIES.

be her own protectress, make contracts for herself, and be responsible for them. Of this opinion, *Buller*, J., seems to have been in *Cox* v. *Kitchin* (*a*); but the Court did not decide upon the wife's personal responsibility merely as a consequence of separating herself from her husband, and living in adultery, but because she had, after leaving her husband, lived as, and represented herself to be, a single woman, and obtained credit in that character. This question, however, has been settled in the great case of *Marshal* v. *Rutton* (*b*). *Lord Kenyon*, in adverting to the above argument, urged in support of the wife's liability, observed, that it was not a necessary consequence of the determination of the husband's responsibility, that she should be at liberty to act as a *feme sole;* for if that were so, it would hold in all cases, but that the contrary was the truth; for if a woman eloped from her husband, withdrawing herself from his protection, and lived in adultery, he was not by law liable to answer for her necessaries, and no case had decided that she was so; and that any persons knowing her condition, if, instead of requiring *immediate* payment, gave credit to her, they had no greater reason to complain of not being able to sue her, than others who had nothing to confide in than the honour of those whom they trusted.

The case of *Marshal* v. *Rutton*, last referred to, is of so high authority, that it is considered as having overruled all prior decisions in contradiction to it. It restored the old established law founded generally upon the relation between husband and wife, by

(*a*) 1 Bos. and Pull. 339. (*b*) 8 Term Rep. 547.

which, with certain known specific exceptions, no married woman was capable of contracting or acting as a *feme sole*, or of suing or being sued as such (*a*). Hence it follows, that if the wife be living apart from her husband in adultery (*b*), or otherwise, she is not personally liable for her engagements; and that upon the plea of coverture, in an action brought against her for that purpose, the Court will discharge her upon filing common bail, when she has been arrested as a *feme sole*, unless she have been guilty of *fraud* by holding herself out to the world as a single woman (*c*).

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although she be living apart from him as an adulteress, &c.

And she will be discharged from arrest on filing common bail, if she have been guilty of no fraud or misrepresentation,

Thus, in *Waters* v. *Smith* (*d*), the Court said, that when a married woman imposed upon a trader and contracted on her own credit, it would not relieve her in a summary way; yet that, according to the last authority on the subject which the Master had furnished (where it had clearly appeared that the defendant was a married woman, and there had been no contradictory evidence about the fact), the Court had discharged her out of custody on filing common bail; that in the present case the fact was positively sworn to on one side, and not contradicted on the other. The rule for her discharge was therefore made absolute.

And, in *Wardell* v. *Gooch* (*e*), *Ellenborough*, C. J., made a similar rule absolute where the wife was living

(*a*) Hatchett v. Baddeley, 2 Black. Rep. 1079. Lean v. Schutz. 2 Black. Rep. 1195. (*b*) Gilchrist v. Brown, 4 Term Rep. 766. (*c*) Partridge v. Clarke, 5 Term Rep. 194. (*d*) 6 Term Rep. 451. Pearson v. Meadon, 2 Black. Rep. 903. (*e*) 7 East. 582. See also Pritchett v. Cross, 2 H. Blackst. Rep. 17. Pitt v. Thompson, 1 East, 16.

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apart from her husband upon a separate maintenance, and the plaintiff, her creditor, who dealt with her, *knew* at that time that she was a married woman.

and whether the debt be contracted before or after marriage.

So also, in *Crookes* v. *Fry* and wife (*a*), the latter was arrested for a debt contracted by her whilst single. To justify the arrest it was sworn that the husband had absconded, and a case of *Robarts* v. *Mason* (*b*) was cited, to prove that the Court would not discharge a wife out of custody who had been arrested with her husband for a debt incurred *before* the marriage. But the Court said, it had been the constant practice where husband and wife had been arrested on mesne process, to discharge the wife, but that the husband could not be liberated without putting in bail for both. The wife was consequently discharged.

Previously to the solemn decision given by the twelve judges in *Marshal* v. *Rutton*, the determinations more immediately preceding it had deeply intrenched upon the common law; but that law being revived, as before stated, and those decisions (*c*) overruled, it is necessary to consider in what instances it permitted the wife, in exception to the general rule, to contract, to sue, and be impleaded as a single woman.

The earliest cases upon this subject proceeded upon the ground of the husband being considered

(*a*) 1 Barn. and Ald. 165. (*b*) 1 Taunt. 254. (*c*) Ringstead v. Lady Lanesborough, and Barwell v. Brooks, Cooke's B. L. 28—31. Corbett v. Poelnitz, 1 Term Rep. 5. Derry v. Duchess of Mazarine, 1 Ld. Raym. 147. De Gaillon v. L'Aigle, 1 Bos. and Pull. 357.

as dead, and the widow as being in a state of widowhood, or upon the marriage contract being dissolved by a divorce *à vinculo matrimonii.*

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Accordingly, if the husband be banished from or abandon his country for life (*a*), or if the marriage be dissolved by act of parliament, in all such cases the wife's disabilities to contract, or to sue and be impleaded as a single woman, are removed. The principle of these exceptions was afterwards extended to transportations for a certain number of years beyond which the husband's life might continue; for, during such exile, the wife being reduced to the same condition as she would have been if the sentence had consigned her husband to perpetual banishment, the Courts determined to impart to the wife the same powers and remedies, and to place her in the like situation as if the return of her husband had been from the first impracticable. During such period, therefore, the marriage contract is suspended, and the wife is to be considered as a single woman so as to be able to contract, to pay and receive money, to sue and be sued, and even liable to be taken in execution. And it would seem that when the husband's limited exile has expired, or if he be pardoned, the disabilities attending coverture will nevertheless continue suspended until his actual return (*b*).

Banishment of husband. Abjuration. Divorce *à vinculo*, &c. Transportation.

It will appear from consideration of the above

(*a*) Belknap's case. Weyland's case, Co. Litt. 133. Wilmot's case, Moor's Rep. 851. Portland v. Prodgers, 2 Vern. 104. Newsome v. Bowyer, 3 P. Will. 37. Sparrow v. Caruthers, cited 2 Black. Rep. 1197. (*b*) Carroll v. Blencow, 4 Esp. N. P. C. 27, cited 11 East, 303.

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exceptions to the general rule of the common law, that they were founded upon the principle of the husband being under the necessity of absenting himself from this kingdom, and that his return to it was forbidden, and did not depend upon his own wil. and pleasure. When the principles laid down in *Marshal* v. *Rutton* are considered, and that the common law did not permit the husband and wife, by any agreement between themselves, to place her in the situation of a single woman as to the power of contracting, &c. it is presumed that (notwithstanding the contrary decisions before referred to (*a*), and some posterior (*b*) to *Marshal* v. *Rutton*), whether the husband be a native subject or a foreigner, if he go abroad leaving his wife here, or being a foreigner, although he may never have been here, still as the husband's absence in either case depends upon his own will, his quitting or being out of the kingdom will not suspend the marriage contract, and place his wife in the situation of a *feme sole*, so as to restore the rights of disposition, personal liabilities, and powers which she parted with on entering into the marriage state (*c*). But when the husband is prevented from coming here, as in the instance of his being an *alien enemy*, then the principle of exception applies as in the examples before set forth.

Semble, that the temporary absence of husband or any absence from this country, when he may return at option, will not intitle wife to sue, &c. as a *feme sole*.

The above observations appear to be supported by the two following cases determined subsequently to that of *Marshal* v. *Rutton*.

(*a*) *Ante*, page 122, note. (*b*) Walford v. Duchess of Pienne. Frank v. Duchess of Pienne, 2 Esp. N. P. C. 554, 587. (*c*) Farrer v. Granard, 1 New Rep. 80. Kay v. the Duchess of Pienne, 3 Campb. 123.

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The first of those cases was *Marsh* v. *Hutchinson* (*a*). The demand was against the wife alone for coals supplied to her the last three or four years; and her defence was coverture. In 1783, her husband (who was an *Englishman*) left this country, and had occassionally been here since that period, but he having purchased the appointment of agent for the *English* packets at the *Brill*, in *Holland*, had for the last ten years resided there, and became possessed of lands in that country. In 1795 his agency ceased, in consequence of the irruption of the *French* into *Holland*, and he sent his wife and family to reside in this country, but he remained in *Holland* to look after his grounds, and with a view to the recovery of his situation if the intercourse between *England* and *Holland* should be re-established. His wife was considered a married woman in the place where she lived, and her counsel insisted, that her husband being *domiciled* in a foreign country, from which he was not likely to return, his wife in this country must be treated as a single woman, and therefore capable of making contracts to *bind herself*. But the Court determined that the husband's residence in *Holland*, under the above circumstances, did not enable his wife, resident here, to bind herself by her own contract as a *feme sole*. And *Heath*, J., observed, that in the old cases of banishment and abjuration, as well as in the more modern ones of transportation, the husband *could not* return, as it would have been contrary to law; and that there was no case in which

(*a*) 2 Bos. and Pull. 226. Chambers v. Donaldson, 9 East, 471, S. P.

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the wife had been held liable, her husband being an *Englishman.*

The second case was one where the action was brought by the wife as a *feme sole;* it was trespass (*a*), to which a plea of the plaintiff being a married woman was put in. It appeared that, in 1805, the husband went to *America*, leaving his wife destitute, and that the plaintiff ever since lived separate from him, and made contracts here, and obtained credit as a single woman; and that she, for her support, had, since the year 1805, carried on trade as a *feme sole.* The Court decided, that the plaintiff could not sustain the action.

Exceptions to the disability of coverture by particular custom:

Another exception allowed to the wife's disability arising from coverture is founded upon particular custom, the same basis upon which the common law itself is grounded.

of the city of London.

Accordingly, by the custom of the city of *London*, a married woman is enabled to carry on trade as a *feme sole* merchant. The custom, as translated from the *Liber albus* in the town-clerk's office, is as follows: "Where a *feme*, covert of the husband, useth any craft in the said city on her *sole account*, whereof the husband meddleth nothing, *such a woman* shall be *charged* as a *feme sole* concerning *every thing that toucheth the craft;* and if the husband and wife be impleaded, in such case the wife shall *plead* as a *feme sole;* and if she be condemned she shall be *committed to prison* till she have made satisfaction, and the husband and his goods shall *not* in such case *be charged* nor impeached."

Feme, a sole trader within the city.

The custom.

(*a*) Boggett v. Frier, 11 East, 301.

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Upon this custom, which must be construed with strictness (*a*), the following observations occur.

Construed strictly.

The trade must be carried on within the city, and on the wife's *sole* account; it seems, therefore, that if by any means it can be proved that her husband had any concern in it, the case will not be protected by the custom (*b*).

The trade must be carried on in the city.

The husband's intermeddling is expressly provided against by the custom. He may, however, determine his wife's trading in future, but he cannot do so in retrospect; neither can he do any act to injure her creditors, who are intitled to be satisfied out of her property in trade; but after those demands are satisfied, he may, as it would seem, by law possess himself of the surplus of her property; for the custom does not extend to this point, it regarding only trade and commerce (*c*). Yet although he may do so at law by virtue of his legal right, still it may be a question whether a Court of Equity would not, as in the instances after mentioned, consider this surplus as the wife's *separate* property, she having procured it by her own industry, and with the permission of her husband, and without any risk incurred by him.

Husband's power in determining the trading,

and his title to the wife's savings.

As to the wife, sole trader, suing or being impleaded.

The proper tribunals for the wife to sue or be impleaded are in this instance those belonging to the city; and the superior Courts will not interfere with these jurisdictions, since the inferior Judges are best acquainted with the customs prevailing within those

(*a*) 1 Roll. Abr. 567. 2 Leon. 109. (*b*) Langham v. Bewett, Cro. Car. 68. 3 Burr. 1782. (*c*) Lavie v. Phillips, 3 Burr. 1782, 1785.

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limits (*a*). But if the wife be sued in one of the Courts at Westminster, and the custom be pleaded, it will be there attended to and allowed (*b*). And when she sues or is impleaded either in the city Courts, or in those above, her husband must be joined for conformity (*c*); for a married woman cannot singly execute a warrant of attorney.

Her husband must be a party.

As a necessary consequence of the wife's power to contract debts in her business, she is liable to a commission of bankruptcy; and this is for her advantage, for a different construction would subject her to perpetual imprisonment (*d*).

She is liable to the bankrupt laws,

but cannot at law execute a valid bond, yet it will be supported in equity.

In *Read* v. *Jewson* (*e*), the Court said that a married woman cannot execute a valid bond at law, because that would bind her heirs if she had real assets, which no custom could warrant. It is, however, a good security in equity, as will appear when the wife's power to dispose of her property as a *feme sole* is afterwards considered. But at law this species of security by the wife has been determined to be void.

Accordingly, in the case of *Roberts* v. *Pierson* (*f*), the plaintiff, who was a married woman, entered into a bond for £100, as a security for the defendant. The defendant gave to her a bond and a warrant of attorney to confess a judgment as a counter security. The wife having been obliged to pay £50 of the above sum for the defendant, entered up judgment upon the warrant of attorney, and took out execution;

(*a*) Cro. Car. 69. 3 Burr. 1782. Beard v. Beard, 2 Bos. and Pull. 97, in which case all the authorities are collected and commented upon by *Lord Eldon.* (*b*) 3 Burr. 1782. (*c*) Caudell v. Shaw, 4 Term Rep. 361. 2 Bos. and Pull. 98. 2 Wils. 3. (*d*) 3 Burr. 1783. (*e*) Cited 4 Term Rep. 362. (*f*) 2 Wils. 3.

and upon an application to set aside the judgment, and for a restoration of the money paid by the defendant to the sheriff, the Court said, "A judgment at the suit of a *feme* covert is void, so is her *bond;* and the money which she paid for the defendant was her husband's, and he may sue for it, so the judgment must be set aside, and the money in the sheriff's hands restored."

EXCEPTION BY PARTICULAR CUSTOM TO WIFE'S DISABILITIES TO CONTRACT, TO SUE, AND BE IMPLEADED.

CHAPTER XVII.

OF GIFTS AND ALLOWANCES BY HUSBAND TO WIFE.

THE exceptions which by the common law and particular customs were allowed to the general disabilities of coverture having been treated upon in the last chapter, we shall next proceed to the consideration of other exceptions to them, and the consequences and effects of such exceptions upon the relation between husband and wife, under the above title: the subjects of which will be treated upon under the following heads:—

I. *The pin-money of the wife.*
II. *Gifts or allowances to her to keep house, &c.; and*
III. *Her paraphernalia.*

Gifts between husband and wife supported in equity.

In the beginning of the first volume it was observed that, by policy of law, the husband and wife are considered as one person, and that upon this union depend almost all the legal rights and disabilities which either of them acquired or suffered during the marriage. In consequence of this unity of persons, although immediate gifts of property by the husband to his wife are void at law (*a*), yet they will be supported in equity (*b*), when the transactions are *bonâ*

(*a*) See vol. 1. p. 53. (*b*) 1 Atk. 271.

fide, and not intended as covers for fraud, nor are such unreasonable acts as to prevent that Court's interference; one of which occurred in the case of *Beard* v. *Beard* (*a*), where by a deed-poll the husband gave and granted to his wife *all* the property which he then had, or might afterwards have. *Lord Hardwicke* said that such a grant or gift could not take effect, because the law would not permit a man to make a grant or conveyance to his wife during his life, and that the Court would not allow the wife to have the *whole* of her husband's estate whilst he lived, for that was not in the nature of a provision, which was all that she was intitled to. PIN-MONEY.

I. But gifts by the husband to his wife for clothes, or to purchase ornaments, or for her separate expenditure, will be good in equity. Such gifts are known by the name of *pin-money*, and may be either a yearly allowance settled upon the wife before marriage, or gratuitous gifts or payments from time to time by him to her afterwards. When such a settlement is made previously to the marriage, it will not only be binding upon the husband, but also upon his creditors, which has been shown in the first volume (*b*). Pin-money.

The following propositions appear to be authorised by the cases upon this subject.

When the wife permits her pin-money to run in arrear for a considerable time, and she is during the whole period supported by her husband, it will be presumed that, in consideration of such support, she waived her claim to pin-money; and upon surviving Presumptive bar to arrears.

(*a*) 3 Atk. 72. (*b*) Chap. 8, p. 297, et seq. For the form of such a settlement see Append. No. 9.

PIN-MONEY.

her husband she will only be permitted to claim arrears for one year prior to his death (*a*).

When such presumption repelled or prevented.

But this is a *presumption* only, and may be repelled. If, therefore, it appear that the wife demanded her pin-money without success, or if she lived separate from her husband, and without any allowance (*b*), she will be intitled to all arrears due at her husband's death; for against express demands for payment, or where there is neither cohabitation nor maintenance of the wife by her husband, a presumption cannot be raised that she intended to give up her claim to pin-money, so that she will be intitled to all arrears up to her husband's death (*c*).

Nor can such presumption arise when the wife is *non sanæ memoriæ*, and therefore incapable of consenting or waiving her right (*d*).

What a satisfaction.

But if the provision be expressed to be made for particular purposes, as for the wife's apparel or private expenses, and they are provided for by husband; this circumstance will bar the wife from claiming any arrears of her pin-money, which otherwise might be due at the decease of her husband; for this will be considered a payment or satisfaction by the husband (*e*).

Thus in *Powell* v. *Hankey* (*f*), *Lord Macclesfield* said that if there be a provision for the wife's separate use for clothes, and her husband provide them for her, her claim to the provision will be barred.

(*a*) 2 Ves. sen. 190, 267. Offley v. Offley, Pre. Ch. 26. (*b*) 1 Ves. sen. 267. (*c*) Ridout v. Lewis, 1 Atk. 269. (*d*) Brodie v. Barry, 2 Ves. and Bea. 39. (*e*) 3 P. Will. 355. (*f*) 2 P. Will. 84.

So also in *Thomas* v. *Bennett*(*a*), pin-money was secured to the wife by settlement before marriage, for her apparel and private expenses: the wife survived her husband and died; then her executors claimed £500 for *ten* years' arrears of the provision, but it appearing that the husband maintained her, and there being no evidence that she had ever demanded the pin-money, the claim was disallowed. Again, PIN-MONEY.

In *Fowler* v. *Fowler* (*b*), *Lord Talbot* said that where pin-money was secured to the wife, and it appeared that the husband, nevertheless, provided her with clothes and other necessaries, that circumstance, during the time that she was so provided for, would be a bar to any demand for arrears of pin-money.

The last case was one upon the doctrine of the satisfaction of a debt by a legacy. The husband, in consideration of the then intended marriage, and of the wife's portion, settled £100 a year upon her for pin-money. Two years' arrears became due, and then the husband gave her a legacy of £500. After the making of the will another year's arrears became due, and then he died. And *Lord Talbot* decided, that the legacy of £500 was a satisfaction of the two years' arrears, because of larger amount than the debt, upon the general rule which is established in such cases; and that the creditor and legatee being a wife made no difference. But his Lordship held that the bequest could not be a satisfaction of the one year's arrears, since that was a debt not contracted at the date of the will, and might possibly have never become due (*c*). A legacy.

(*a*) 2 P. Will. 341. (*b*) 3 P. Will. 355. (*c*) For the distinctions which have been established as to when a legacy shall and shall not be a satisfaction of a debt, see "Treat. upon Legacies," vol. ii. chap. 13, p. 1, &c. 2 *ed.*

PIN-MONEY.

Semble, that elopement or adultery of wife is no bar to her enforcing payment of her pin-money or other separate estate,

In former passages of this work the consequences of the wife abandoning her home, and also of her living in adultery, have been considered (*a*); and it is presumed that this proposition may be deduced from the majority of the cases, that when the wife unnecessarily elopes from her husband, and does or does not live in adultery, if she apply to a Court of Equity for a *favour* (and *not* for a *right*), as for a maintenance out of her equitable property, the interest of which her husband is intitled to receive, the Court will not interfere in her behalf. But if she apply to its jurisdiction for the recovery or enforcing of her *rights*, as for the performance of articles before the marriage for a settlement to her separate use; there the Court must interfere, since the law has not made elopement or adultery a forfeiture of any such interests, but of dower only.

and that a Court of Equity will not enjoin her trustees proceeding at law to recover her pin-money.

Cases considered.

Upon this principle, therefore, notwithstanding the loose note of the case of *More* v. *The Earl of Scarborough*, to be found in Equity Cases abridged (*b*), and the *obiter dictum* of *Lord Hardwicke*, in *Moore* v. *Moore*, after mentioned, it is presumed that a Court of Equity cannot, at the suit of the husband, enjoin the trustees of an adulteress from proceeding at law to compel payment of her pin-money, except upon paying up the arrears; nor refuse to interfere on her part to compel the execution of a settlement in pursuance of articles entered into previously to the marriage. In *Lee* v. *Lee*, shortly reported in *Dickens* (*c*), the Chancellor refused *in limine* to restrain the husband from receiving the rents of estates

(*a*) Vol. 1. p. 272, 517, 549. (*b*) 2 vol. 156, pl. 7. (*c*) Pages 321, 806.

which before the marriage had been settled to the wife's separate use; the reason given by his Lordship for the refusal was, that the wife having left her husband without a cause, and refusing to return, the motion, if granted, might altogether prevent their future cohabitation. The refusal, therefore, was not a decision of the question in the cause, but it was made under certain circumstances, and with a particular view, viz. to cause a reconciliation between man and wife; and the case of *Moore* v. *Moore* (*a*), referred to in it, is one of quite a contrary effect. There £100 a year pin-money were, before marriage, secured by a term for years in trustees for the wife's separate use. After twenty years' cohabitation in harmony, they quarrelled, and she left him, and went abroad. Her trustees brought an ejectment for recovering possession of the term, the annuity being in arrear. To stay these proceedings, the husband filed a bill complaining of his wife's elopement, offering to take her back again, and to forgive what was passed; but *Lord Hardwicke*, after observing that possibly the agreement before marriage might have been designed to provide for the wife if the parties should disagree, and that the husband had made payments of the annuity since the wife's elopement (a strong presumption that he thought at least her separation was excusable), ordered the arrears of the pin-money to be paid, with costs; and, upon payment and keeping down the growing payments of the annuity, his Lordship continued the injunction which had been obtained by the husband. PIN-MONEY.

(*a*) 1 Atk. 276.

PIN-MONEY.

The right of the wife to call upon a Court of Equity to enforce her equitable interests, although she may have left her husband, and also have added to that impropriety the crime of adultery, appears to be established by the two following cases.

In *Sidney* v. *Sidney* (*a*), the wife by her bill prayed the specific performance by the husband of his agreements in articles made before marriage, in which he covenanted to convey estates to the use of himself and wife for their lives in succession, &c. and she, a minor with consent of guardians, covenanted to settle her estates as therein mentioned. The husband stated in his answer, that *his wife had withdrawn herself from him, and very much misbehaved herself.* There was strong evidence of her criminal conversation with another man, and there was also some proof of the husband's adultery; yet the wife obtained a decree for a specific performance at the *Rolls*, from which the husband appealed to *Lord Talbot*, who confirmed the decree, observing that the answer did not sufficiently put the fact of adultery in issue (*b*), and he, therefore, could not decide upon it; that articles for a jointure were considered in equity as an actual and vested jointure, and that it was not forfeited either by the wife's elopement or adultery, and that the reason why she loses her dower by committing adultery, is from the effect of the statute of Westminster the second (*c*).

The second case is *Blount* v. *Winter* (*d*). There were two bills filed, the one by trustees in marriage articles, and the children of the marriage against

(*a*) 3 P. Will. 269. (*b*) 1 Atk. 276. (*c*) Chap. 24. (*d*) Stated in a note to the case of Sydney v. Sydney, 3 P. Will. 277.

husband and wife; and the other by the husband against his wife and children. The first bill prayed a performance of the articles; and the husband by his answer, and also by his own bill, resisted the performance, so far as the articles made a provision for his wife, alleging and *proving* that she lived separate from him *in adultery*. The Court was of opinion that this was no reason for a non-performance of the articles as to the wife, and decreed accordingly in the first cause, and dismissed the husband's bill, but without costs.

ALLOWANCE TO WIFE TO KEEP HOUSE, &c.

Upon the whole it is presumed, upon these authorities, that the wife's elopement only, or her elopement and adultery, do not deprive her of the power of enforcing any of her legal (*a*) or equitable rights, with the exception of her right to dower.

II. There is a species of allowance to the wife by the husband, which may be classed under the head of pin-money. It is where he permits his wife to have and make profit of certain articles of his property, either for her own use, or in consideration of her supplying the family with particular kinds of necessaries, or where he makes to her a yearly allowance for the keeping of his house. The profits in the first case, and the savings in the other, will in equity be considered as the wife's own separate estate, although at law they belong to the husband, upon the principle that all the personal property which a married woman acquires is that of her husband.

Allowance to wife to keep house, &c.

Savings are her own separate property.

In *Sir Paul Neal*'s case (*b*) it was decreed, that if

(*a*) Field v. Serres, 1 New Rep. 121. (*b*) Cited in Herbert v. Herbert, Pre. Ch. 44.

ALLOWANCE TO WIFE TO KEEP HOUSE, &c.

a woman have pin-money or a separate maintenance settled upon her, and by management or good housewifery she save money out of it, she may dispose of the savings, or any jewels, &c. bought with them, by writing in nature of a will, if she die before her husband; or if she be the survivor, then it was said that the money shall be her own, and not be liable to her husband's debts. But this exemption from debts must mean, as it is presumed, when such provisions are made, or agreed to be so, before and in contemplation of marriage, for in that case the wife is a purchaser of them for a valuable consideration; but when they are made during the marriage, they being void in law, and enforced only in equity, that Court will not proceed to the extent of taking from the creditors a fund which is legal assets of the husband to satisfy their debts (*a*).

Their and pin-money's liability to husband's debts.

A leading case upon this subject is *Slanning* v. *Style* (*b*). It appeared that the husband allowed his first wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters, which arose from his farm, and beyond what was used in the family, for her own separate use; and which allowance he called her pin-money. From her death, until he married the defendant *Style*, his sister kept his house, and had the same allowance, which was continued to the defendant, the second wife, as pin-money. It was in *proof*, that whenever any person came to buy any fowls, pigs, &c. the husband said he had nothing to do with those things, which were his wife's; and it

(*a*) Pre. Ch. 297. (*b*) 3 P. Will. 337.

further appeared in evidence, that he confessed that he, having been making a purchase of about £1000 value, and being in want of money, had been obliged to borrow £100 from his wife to make up the purchase-money. The husband being dead, his widow claimed the £100 out of his estate. And *Lord Talbot* decreed that she should be a creditor for such sum, observing, that the money being the wife's savings, and the husband's agreement having been proved, it was but a reasonable encouragement to her frugality, and that such agreement would be of little avail, if it were to determine with his death; that it was the strongest *proof* of the husband's consent, that the wife should have a separate property in the money arising by the savings, in that he had applied to and prevailed with her to lend him the £100; for he did not claim it as his own, but submitted to borrow it as her money. Therefore, and especially as there was *no creditor* of the husband to contend with, his Lordship decreed as above.

ALLOWANCE TO WIFE TO KEEP HOUSE, &c.

In *Calmady* v. *Calmady*, referred to in the last case, the husband agreed with his wife, that upon every renewal of a lease by him, she should receive from the tenant two guineas, and that sum was allowed to be her separate money.

So, also, in *Mangey* v. *Hungerford* (*a*), the wife, as it appeared, had saved a considerable sum of money out of house-keeping, and in a suit instituted against her for a discovery of what she had saved, she insisted by *answer* that she was not bound to make such a discovery; and upon exceptions to the answer it was held sufficient by *Lord King*.

(*a*) 2 Eq. Ca. Abr. 156 in marg.

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These savings being to be considered the separate property of the wife, she may either dispose of them by will as a *feme sole* or by act in her lifetime (*a*).

With respect to the general power of the wife to dispose of the savings arising from her separate property, the principle is laid down by the *Lord Keeper* in the case of *Gore* v. *Knight* (*b*) to the following effect: that the wife having a power to dispose of the principal, she necessarily has the like power over its produce, for the *sprout* is to savour of the *root*, and to go the same way.

The last subject proposed to be considered was,—

Paraphernalia.

III. The wife's paraphernalia.

The term paraphernalia is of Greek derivation, παρα φερνη, i. e. somewhat to which the wife is intitled over and above dower; and according to the civil law, "Bona Parapherna sunt quæ mulier ultra dotem adfert, et de his bonis maritus administrationem habet, ita ut sine speciali uxoris mandato et agere et convenire possit (*c*)."

The articles comprised under this term include such apparel and ornaments of the wife as are suitable to her condition in life (*d*). What are to be so considered, are questions to be decided by the Court, and will depend upon the rank and fortunes of the parties (*e*).

Pearls and jewels, usually or sometimes worn by

(*a*) Sir Paul Neal's case, stated *supra*, p. 137. (*b*) 2 Vern. 535. See also 1 Vern. 244. Gold v. Rutland, 1 Eq. Ca. Abr. 346, pl. 18; and Cecil v. Juxon, 1 Atk. 278, stated *infra*. (*c*) Minsing on the Institutes, p. 97. 2 Black. Com. 436. (*e*) Bindon's case, Moor, 213. See also 2 Leon. 166. Cro. Car. 343. 1 Roll. Abr. 911. Pre. Ch. 27.

the wife, properly fall within this term (*a*). And in *Mangey* v. *Hungerford* (*b*), the widow claimed her gold watch and several gold rings as paraphernalia, which had been given to her at the funerals of relations, and they were decreed to her by *Lord Talbot.*

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When gifts are made by husbands to their wives of pearls, jewels, &c. and they are worn as ornaments, the articles so given are to be considered merely as paraphernalia, and not as gifts to the separate uses of the wives; for if they were adjudged as donations to the separate uses of the wives, then they might dispose of them, which would be contrary to the intentions of the donors. And although the trinkets be not usually, but only sometimes worn by the wives, such occasional uses of them will be sufficient to class them under the term paraphernalia (*c*).

What gifts by the husband so considered.

Of such presents, or of her other paraphernalia, a wife cannot dispose by gift or will during her husband's life. Nor can he dispose of them by will during her life, although he may sell or give them away (*d*); and with this and the cases in equity agree the opinions of *Berkley* and *Jones*, Justices, in *Hastings* v. *Douglas* (*e*). If, then, the husband bequeath all his wife's jewels, &c. to some of which she is intitled as paraphernalia, the disposition will be disappointed so far only as regards the latter

The power over them of husband and wife singly.

(*a*) 1 Roll. Abr. 911. (*b*) 2 Eq. Ca. Abr. 156 in marg. (*c*) Graham v. Londonderry, 3 Atk. 394. (*d*) 1 P. Will. 730. Wilcox v. Gore, 11 Vin. Abr. 180, pl. 19. 2 Atk. 78. Seymore v. Tresilian, 3 Atk. 358, 369. (*e*) Cro. Car. 344.

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jewels. And when such a general disposition is made, the only difficulty is to ascertain what shall be considered paraphernalia and what not.

In *Calmady* v. *Calmady* (*a*), *A* having a crocheat of diamonds which belonged to his first wife, devised it to his eldest son, and that it should go in succession to the heir of his family as an heir-loom. *A* afterwards married the defendant *C*, turned the crocheat into a necklace, and *added several new diamonds* to it, at the expense of £200, which exceeded the value of the crocheat. *B*, the then eldest son of *A*, claimed the crocheat from *C* under the will, who insisted upon retaining it as part of her paraphernalia, *A* having permitted her to wear it. And *Parker*, C., seemed to doubt at first, whether turning the crocheat into a necklace, adding new diamonds to it, and permitting the wife to wear it, were not a revocation of the bequest; but he ordered the Master to examine and separate the *old* from the *new* diamonds, and decreed the diamonds of the crocheat to the plaintiff as heir, and specifically devised to him as an heir-loom. Although no mention is made in the report of the *new* diamonds, yet it is inferred from the separation, that they must have been ordered to the widow as part of her paraphernalia.

Liable to husband's debts,

2. As the husband may dispose of his wife's paraphernalia in his lifetime, so they will be liable to his debts (*b*).

In *Ridout* v. the *Earl* of *Plymouth* (*c*) the question was, whether jewels, rings, pictures, dressing plate, and other trinkets given to *Mrs. Lewis before* her

(*a*) 11 Vin. Abr. 181, 21. (*b*) 17 Ves. 273. 2 Ves. sen. 7.
(*c*) 2 Atk. 104.

marriage, belonged to her as her *separate* estate, and the husband was to be considered a trustee for her; and whether, as to things given *after* the marriage, viz. mourning rings, family pictures, &c. they should not be retained by the widow, as of too trifling a value to be considered her husband's personal estate? And *Lord Hardwicke* decided that the widow could not claim the articles as paraphernalia, when her husband's assets were insufficient to pay his debts; also, that he could not be considered in the light of a trustee of the jewels, &c. given to her *before* marriage, since that would be a manifest prejudice and fraud upon his creditors; and that there was no pretence for considering the things given *after* the marriage as the property of the widow; but his Lordship allowed her to be a purchaser at the value set upon them by the Master, none of the parties opposing it.

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It is presumed that the question in the last case was decided upon gifts made *by* the husband of articles forming parts of his own estate; for it seems that when they are made to a wife either before or after marriage by a relative, or friend, they will be considered as intended for, and gifts to the *separate use* of the wife, and that therefore she may dispose of them as a feme sole, and that they will be exempt from the alienation and debts of her husband.

except when the articles are given by a stranger, and then they are considered as property given to the wife's *separate* use, and consequently free from her husband's debts.

Thus in *Graham* v. *Londonderry* (*a*), the husband's father, upon the wife's marriage with his son, gave her as a present some diamonds. And *Lord Hardwicke* said that the Court of late had considered such a present as a gift to the *separate* use of the wife,

(*a*) 3 Atk. 393.

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and that he was of opinion that she was intitled to the diamonds in her *own right*. In that case there were four diamonds set about the picture of the then late Regent of *France*, which picture, upon the husband's return from France, he delivered to his wife, and told her that it was a *present* sent to her *by* the Regent. As to this *Lord Hardwicke* observed, that if it were such a present, it was within the above rules, for then it being a present *by a stranger* during the marriage must be considered as a gift to the wife's *separate* use, although his Lordship did not consider the case so clear as the other. In support of his opinion, *Lord Hardwicke* referred to several cases, two of which were in his own time; the first was *Lucas* v. *Lucas* (*a*), in which were two questions, one in respect of £1000 *South Sea* annuities which the husband had transferred into his wife's name, and the other as to jewels, &c. given *by* the wife's *father* to her; and his Lordship was of opinion that she was intitled to both as gifts to her *separate* use. The second case was *Brinkman* v. *Brinkman*; there articles of plate were given to the wife after marriage by the husband's *father*, and *Lord Hardwicke* was of opinion that they were to be considered as gifts for her *separate* use.

The interest of the wife in her paraphernalia is so much favoured in equity, that if the husband die indebted, and her *paraphernalia* are taken by his specialty creditors in satisfaction of their demands after all the general personal estate is exhausted, she will be allowed to stand in the places of such

(*a*) 1 Atk. 270.

creditors, to reimburse herself out of the real estate in the possession of the *heir* the amount of her paraphernalia, and she is intitled to a precedency in payment to legatees (*a*).

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Wife's paraphernalia are preferred to legacies.

3. With respect to the equity of marshalling the assets in favour of the wife, the same rule applies as in marshalling for simple contract creditors and legatees, which is, that when a creditor, as by specialty, has the option of resorting to both the real and personal assets for a satisfaction of his debt, and simple contract creditors or legatees have the power only of resorting to the latter fund for payment of their demands, if there be a deficiency of the personal estate to pay both of them, the Court will so marshal or arrange the different estates as to confine the specialty creditor to the real fund if sufficient, for a satisfaction of his debt, in order that the personal estate may be left free to answer the demands of the simple contract creditors or legatees; or in case the specialty creditor shall have received payment of his debt out of the personal assets, then the Court, upon proper application, will permit the simple contract creditors or legatees to receive satisfaction out of the real estate to the amount of what such specialty creditor was paid out of the personal fund. But in order to enable the Court to extend to simple contract creditors or legatees these advantages, the real estate must be *charged* with the payment of debts, or of one or more legacies, or when there is no such charge the specialty creditor must have a *lien* upon the estate, *except* when the owner of it is *heir* at law,

Assets marshalled in favour of widow's right to paraphernalia.

As against the heir.

(*a*) Snelson v. Corbett, 3 Atk. 370. Tipping v. Tipping, 1 P. Will. 729. Aldrich v. Cooper, 8 Ves. 397.

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and then as against him the simple contract creditors or legatees will be permitted to throw the general bond debts upon the lands, in exoneration of the personal estate. But against a *devisee* of the estate it seems that there must be some such *lien* as beforementioned, as by virtue of a mortgage, &c.

Or devisee.

Accordingly in *Tynt* v. *Tynt* (*a*), the husband died indebted by *recognizance*, and devised his real estates. As to the *bona paraphernalia* of the widow the Master of the Rolls said, that although there were debts more than the personal estate would extend to pay, yet as such goods were liable only in favour of creditors and *not* of the heir nor of the *devisee*, who stood in the place of the heir, and was *hæres factus*, if the lands devised were sufficient to pay the recognizance the paraphernalia should be enjoyed by the widow.

Also in *Tipping* v. *Tipping* (*b*), the husband before marriage *covenanted* for himself and heirs with his wife's trustees, to invest £3500 in a purchase of lands to be settled upon her in jointure, remainder to the first and other son and sons of the marriage successively in tail male. He died intestate and without issue, leaving assets in fee descending to his nephew and *heir*. The personal estate was insufficient to pay his debts. His widow and administratrix filed a bill against the heir to compel him to make good her jointure, and to have the deficiency of the personal supplied out of the real assets. She had jewels, &c. of about £200 value, which were

(*a*) 2 P. Will. 542, and see the cases collected in the "Law of Legacies," under the title marshalling of assets, vol. 1. p. 456. 2 ed.
(*b*) 1 P. Will. 729.

her *paraphernalia;* and the question was, whether those articles should in the first place be liable to satisfy the covenant in ease of the real estate *descended*, they being personal estate, which in general ought to be so applied. And *Lord Macclesfield* said, that *bona paraphernalia* were only liable to creditors and not to an heir, and that specialty creditors were unconcerned in the question, as having under their securities a right to go against the land, it was indifferent to them whether they were paid out of the real assets, or the *bona paraphernalia;* putting them aside, therefore, the wife should *retain* her *bona paraphernalia.* PARAPHERNALIA.

And in *Boynton* v. *Parkhurst* (*a*), *Sir Griffith Boynton* by his will empowered his wife (whom he made executrix) to raise by mortgage of a particular real estate, a sufficient sum of money for payment of his debts, in aid of his personal estate, and devised to her the use of her jewels for life. The cause coming on for further directions, a question arose, whether the wife was not intitled to the jewels absolutely, as her *paraphernalia*, although the personal estate was not sufficient to pay the debts, or whether they should be applied before the real estate charged with the debts? And upon the authority of the last case of *Tipping* v. *Tipping*, *Lord Thurlow* decreed the jewels to the wife in prejudice of the charged estate.

In *Burton* v. *Pierpoint* (*b*) *Lord Macclesfield* said, "that if there should not be assets real and personal at the *testator's death, or at least at the time when the jewels or paraphernalia were applied to debts*, then the paraphernalia should be liable," meaning that

As to widow's right to receive value of paraphernalia out of contingent or future assets of her husband.

(*a*) 1 Bro. C. C. 576. Ed. by *Belt.* (*b*) 2 P. Will. 79.

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they should be so applied, and the widow have no compensation at a subsequent period, although at the time when the paraphernalia were so applied there was a possibility of assets *in future*, as upon a failure of issue, which afterwards happened; for his Lordship observed, that such a remote contingency was not to be regarded, since the event was such as might not take place for many years after the testator's death, or even not till after the widow's decease, when the end and design of her paraphernalia could not be answered. In the present case the husband at his death was seised of a reversion in fee expectant on the failure of issue male. He had also a small unsettled freehold estate, and bequeathed to his wife her jewels and plate for life, and devised all his real estate to *B* subject to debts and legacies. He left two infant sons, and at that time his real and personal assets were insufficient for the payment of his debts, so that his wife's paraphernalia were applied towards making up the deficiency. The sons afterwards died minors, and without having been married, by which events the reversion in fee falling in became liable to debts under the will. And *Lord Macclesfield*, after expressing himself as above, decreed that as there was an *express* bequest of the jewels to the widow, notwithstanding that at the testator's death there were neither real nor personal assets, yet since afterwards, though by a remote accident, assets had happened, there could be no inconvenience to any creditors or other persons, and that the legacy should be paid, and the intention of the testator performed; and the rather, for that the real and personal assets were by the will made liable to the debts and *legacies*.

The above distinction taken by *Lord Macclesfield* seems to be founded upon this principle, that when the wife's right is left to the provision of law, and the real and personal assets are insufficient to pay his debts, then for the sake of the creditors her paraphernalia must be applied in payment of their demands, and not detained from them in expectation of that which may never happen, a contingency of subsequent assets falling in; and that such possibility or contingency happening after the paraphernalia are so applied shall not for the sake of certainty and quiet, as also from the nature of such provision, intitle the wife, or the persons claiming under her, to institute proceedings for the purpose of recovering out of the accidental assets the value of the paraphernalia which had been so applied. But when they are given to the wife by will, and the real and personal assets are charged with debts and legacies, then since the wife is made a *legatee* of her paraphernalia, she as well as any other legatee or her representative will be intitled to an execution of the trust, and, upon the assets falling in, to have them applied in the discharge of such legacy.

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4. If the alienation by the husband in his lifetime of the wife's paraphernalia be not absolute, but as a pledge or security for money, his wife surviving him will be intitled to have them redeemed out of his personal estate, even to the prejudice of *legatees*, because her right is anterior and to be preferred to their claims, which are merely voluntary (*a*).

Her equity when paraphernalia are pledged by her husband.

The widow may bar her right to her paraphernalia by settlement in like manner as has been before men-

Paraphernalia barred by settlement.

(*a*) 3 Atk. 395. 1 P. Will. 730.

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tioned in regard to her title by the custom of *London*, and under the statute of distribution.

Thus in *Cholmely* v. *Cholmely* (*a*), the widow by marriage articles stipulated that she should have nothing of her then intended husband's personal estate but what he should devise to her, and the Court declared that she was barred not only of her customary part but also of her paraphernalia.

And by widow's acquiescence.

5. Another bar occurs when the husband takes upon himself to bequeath to his wife her paraphernalia for life, and she does not claim them absolutely by her elder title as paraphernalia; in this case, it is presumed, that her administrator after her death will not be intitled to them; and such seems to have been the opinion of the Court in the case of *Clarges* v. *Albemarle* (*b*). There the husband bequeathed to his wife for life her paraphernalia. She died without having elected to take them absolutely against the will; and according to *Mr. Vernon*, the Court allowed a plea to the bill of her administrator praying payment of their full value.

Hence it is to be considered as a legal inference, that if a widow when her paraphernalia are bequeathed to her for life do not manifest by some act her intention to take them by her elder and better title, she will be presumed to have elected to take them under the will, so as to bind her executor or administrator.

(*a*) 2 Vern. 83. (*b*) 2 Vern. 247.

CHAPTER XVIII.

THE WIFE'S POWER OVER HER SEPARATE PROPERTY IN OPPOSITION TO THE MARITAL RIGHTS OF HER HUSBAND.

UNDER this title will be considered:—

I. *The effects upon the husband's marital rights of limitations of real and personal estates, made to the wife's separate use, when* no trustees *are appointed for her benefit.*

II. *The effect upon such rights of a* mere agreement *between husband and wife that she shall dispose of her real or personal estate.*

III. *What clauses or expressions will and will not create a* trust *for the wife's* separate use. And,

IV. *Of the wife's separate trading under her husband's agreement before and after marriage.*

It appears in former parts of this treatise (*a*), that the common law would not permit the wife to take or enjoy real or personal estate separate from and independent of her husband, except in cases of necessity, which have been before considered (*b*). But this rule or disability has been further relaxed or removed in modern times; and even in Courts of

(*a*) Vol. 1. pp. 3. 53. 166. (*b*) *Supra*, p. 123.

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Law, as it will afterwards appear, the capacity of the wife to enjoy property separate from her husband has been acknowledged.

Although no trustees be appointed for wife under a limitation to her separate use, equity will convert her husband into a trustee for her.

I. The interposition of trustees seems at the first to have been deemed essentially necessary in order to protect the wife's separate interest (*a*), and regularly when property is intended to be given or settled upon married women for their separate uses, it ought to be vested in trustees for them (*b*); but it has been established ever since the year 1725, that if land or personalty be devised or settled to or upon a married woman for her separate use without the precaution of vesting it in trustees, still, in equity, the intention will be effectuated, and the wife's interests protected by the conversion of her husband into a trustee for her.

Instances.

Thus in *Bennet* v. *Davis* (*c*), *A* devised his real estates to his daughter *B*, the wife of *C*, in fee for her *separate* use, exclusively of her husband; and he declared that *C* should not be tenant by the curtesy, nor have the lands for his life if he survived *B*; but that on *B*'s death they should descend to *B*'s heirs. The defendant *Davis* was assignee under a commission of bankruptcy which had issued against *C*; and upon the wife's bill to compel an assignment of the lands to her *separate* use, that was resisted by *Davis*, upon the principle that the estate not having been conveyed to trustees for the wife's separate use, the husband's legal right to the profits attached,

(*a*) Harvey v. Harvey, 1 P. W. 125. Burton v. Pierpoint, 2 P. Will. 19. (*b*) For the forms of a settlement of *real*, and a gift by will of *personal* estate, to the separate use of a married woman, see Append. No. 14, and No. 15. (*c*) 2 P. Will. 316.

notwithstanding the contrary intention apparent upon the will, and that therefore he, *Davis*, as the husband's assignee, was intitled to them; but the Master of the Rolls decreed in favour of the wife, declaring that the husband took as a trustee for her, and that there was no difference where the trust was created by the act of the party, and where by the act of the law; also that the assignee, claiming under the husband, took the property, subject to the same trust.

WHEN HUSBAND A TRUSTEE FOR HIS WIFE.

The following case was on a chattel interest. In *Parker* v. *Brooke* (*a*), the testator bequeathed to the separate use of his daughter (a married woman) for life, remainder to her children, leasehold estates after the death of her mother; and although no trustees were interposed, the husband was considered a trustee for his wife. Upon the same subject, *Lord Eldon* said, in *Rich* v. *Cockell* (*b*), that it was perfectly settled that a husband might in a Court of Equity be a trustee for the separate use of his wife.

A Court of Law has even extended its protection to the wife against the husband, when no trustees were appointed in the deed by which her title to separate property was created, holding that persons named in a will as trustees for the person from whom she claimed, were also to be considered trustees for her.

Instance where a Court of Law would not interfere for husband, although no trustees were appointed in the deed limiting property to his wife's separate use.

Accordingly, in *Davison* v. *Atkinson* (*c*), the testator devised some lands in which collieries had since been discovered, to three persons, in trust to sell for the benefit of others, of whom *B*, (afterwards the wife of *A*,) was one; and until sale, the trustees

(*a*) 9 Ves. 583. (*b*) Ibid. 375. (*c*) 5 Term Rep. 434.

When husband a trustee for his wife.

were to receive the rents, and to pay a part of them to *B*, for her sole and separate use. The lands were not sold, and the trustees let the collieries. Before *B*'s marriage, she conveyed one-eighth part of the profits of the collieries to *C*, the plaintiff's wife (*not to a trustee for her*), to her sole and separate use. The trustees in the will having no notice of the conveyance to *C*, paid to *B* her share of the rent under the will. *C*'s husband brought an action of *assumpsit* against the husband of *B*, to recover one-eighth part of the rent, upon the ground that as no trustee was appointed for the plaintiff's wife in the conveyance made to her, it was in law a conveyance to the husband, who alone had a right to sue for the money; but the Court held, that the trustees under the will, in whom the legal estate was vested, were to be considered as trustees for *C*, the plaintiff's wife, and that the husband was not intitled to recover in the action; *Lord Kenyon* observing, that the interests of the plaintiff and his wife were in direct opposition to each other, and that if the Court permitted him to recover the money which was intended for her separate use, her separate right would be destroyed.

So also property expressly given *to* husband for his wife's separate use, will make him her trustee; and the trust will be enforced against his assignees in bankruptcy, &c.

The above are cases where the property was given by strangers to the wife's separate use; but the principle equally applies, and even more strongly, when the estate is given *to* the husband for her separate use (*a*). In these instances he will be a *trustee* for his wife of such property, and the wife's equity to it will be enforced against assignees in bankruptcy, and under the insolvent debtors' acts,

(*a*) 3 Atk. 399. 9 Ves. 369.

and against trustees under conveyance from the husband to pay debts (*a*). But the title of a purchaser from the husband, without notice of the trust, will not be disturbed in equity; for when the equities of the parties are equal, and the property is equitable, that Court will not act for the purpose of taking from a *bonâ fide* purchaser the property which he has acquired for a valuable consideration: if, however, he or his agent in the transaction, had *notice* of the trust prior to the completion of the purchase, he will then be bound by the wife's equity, and be equally a trustee for her as her husband was previously to the sale and conveyance.

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And although not against a *bonâ fide* purchaser, yet if he have notice of the trust, he also will be bound by it.

Accordingly, in *Parker* v. *Brooke* (*b*), before referred to, and in part stated, the husband in the year 1791 mortgaged leasehold estates which were bequeathed to his wife's *separate* use for life, remainder to her children, without the intervention of a trustee; and he obtained reversionary leases of the premises for 99 years, determinable on a life. He also in 1792 made another mortgage of all the premises; which securities were in 1794 agreed to be assigned to the defendant *Brooke*, but which agreement was not carried into effect. In 1800 *Brooke* obtained possession of the lands, in an ejectment brought by him against the husband, upon the latter's confession of the action. The husband then died, and after that event the wife and her child filed a bill against *Brooke* and the mortgagees, charging them with notice of the will, and that *Brooke* obtained possession of the premises in collusion with the husband,

(*a*) See *ante*, p. 90. (*b*) 9 Ves. 583.

WHEN HUSBAND A TRUSTEE FOR HIS WIFE.

&c.; and they prayed an assignment of the original terms to trustees for them, upon the trusts of the will, cancellation of the mortgages, delivery up of the reversionary leases, possession of the premises, and an account of profits on payment of the fines. *Brooke* insisted upon his agreement, as being for a *valuable* consideration. The mortgagees stated (in answer to a charge in the bill), that the mortgage monies were paid when the securities were obtained. It was in evidence that the *reversionary* leases were beneficial, and were granted to the husband upon his representations that he was intitled to the privilege of those reversionary leases under the will of the former tenant. *Sir William Grant,* Master of the Rolls, decided that there was no distinction between the mortgage of the original and of the reversionary leases, that the *trust* in both cases referred to the same circumstances, and that there was equally *notice* in both. His Honor observed, that the whole originated in mistake of the law, and the effect of the omission of trustees; that there was complete *notice*, for *those who drew the deed* introduced the history of the transaction, as laying the foundation for the husband's right to the renewed lease. The decree was in favour of the wife and child, and an account directed, in conformity with the prayer of the bill.

It is settled, therefore, that when the intention appears that the property bequeathed to or settled upon the wife, should be to her sole and separate use, whether it be so given immediately to her, without the intervention of trustees, or to her husband for her, a Court of Equity will effectuate the intention by converting the husband into a trustee for his wife.

WHEN HUSBAND A TRUSTEE FOR HIS WIFE.

II. The same principle of equity applies and prevails when the husband *before* marriage *agrees*, by writing, that his wife shall be intitled to specific parts of real or personal estate for her separate use, but from the property not having been so actually settled, the legal title to it becomes vested in him by the subsequent marriage. In all such cases the husband will be a trustee of the funds for the wife's separate use; which trust will bind all persons succeeding to the property through him, with such qualification as noticed in the last section.

Husband's agreement in writing before marriage, that his wife shall have separate property, converts him into her trustee.

But such agreement must be in writing, or the non-reduction of it into writing must be owing to the fraudulent conduct of the husband, otherwise the statute of frauds will interpose between the wife's equity and the liability of the husband to perform his promise. This subject having been discussed in the first volume (*a*), the reader is referred to it.

Agreement must be in writing.

When, however, a settlement is actually made *before* the marriage, and it appears from it to have been intended to secure to the wife property for her separate use, but the deed, as framed, is defective in that particular, a Court of Equity will rectify the mistake from the internal evidence in the instrument (*b*). But if such evidence cannot be collected from the deed, *parol* testimony is inadmissible to prove such intention; neither can any writing executed subsequently to the completion of the settlement, be permitted to alter it. If, indeed, an error be discovered in the deed *prior* to its execution, and a party to it refuse for that reason to

And if a settlement before marriage be insufficient to secure property to wife's separate use, the Court will correct it; but not upon parol evidence: nor can a subsequent writing alter the settlement. Exception.

(*a*) Page 305. (*b*) *Ante*, p. 96.

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sign it until a memorandum in writing, corrective of the mistake, be prepared and signed by a party or parties to the settlement, in that case the deed will be altered or controlled by the subsequent instrument, in that particular, as it was admitted in *Tyrrell* v. *Hope* (*a*); because both instruments were executed at the same time, and are to be considered and construed as one deed. So also when a settlement is made *after* marriage, in pursuance of *articles* entered into before its celebration, and the deed is required for the above reason to be rectified, a Court of Equity will not comply with the request without a production of such articles, or other competent evidence of their contents, if the original be lost (*b*).

When settlement after marriage, not corrected by articles before marriage.

What will and will not be a good settlement by the husband to the separate use of his wife, against his creditors, or a purchaser, the reader will find treated upon in the eighth chapter of the first volume.

What will raise a trust for the wife's separate use.

III. That which I propose now to consider, is what clauses or expressions have been deemed sufficient to raise a trust for the separate use of the wife, and what have not been so considered.

1. The expressions which have been held sufficient to raise a trust for the wife's separate use.

It appears from the cases before cited, that the words "to the wife's sole and separate use," are sufficient (*c*). Indeed, whenever it appears, either from the nature of the transaction, as in the instance of a settlement in the contemplation of marriage,

(*a*) 2 Atk. 558—560, stated in the next page. (*b*) Cordwell v. Mackrill, Ambl. 517. (*c*) To which may be added the cases of Adamson v. Armitage, Coop. Rep. 283, and Ex parte Ray, 1 Madd. 199.

where the husband is a party, or from the whole context of the instrument limiting to the wife the property, that she was intended to have it to her sole use, that intention will be carried into effect by a Court of Equity.

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Thus in *Tyrrell* v. *Hope* (*a*), (the case of a settlement before marriage), when the deed was read over to the wife, and before its execution, she observed that there was a mistake, for that the moiety of certain premises limited to her mother for life, was after her death limited to the husband for life, and not to her own separate use, as had been agreed upon; she therefore having refused to execute the settlement unless the mistake was rectified, the husband signed a note, by which he agreed with his intended wife, that "she should *enjoy* and *receive* the issue and profits of a moiety of the estate then in the possession of her mother, after the mother's death."[22] This note was satisfactory, and then the wife executed the settlement. The husband having become a bankrupt, the Master of the Rolls decided against the claims of the husband's assignees to his property, holding that it was a trust in the husband to the wife's separate use. His Honor observed, that the words in the note could admit of no other construction than that the property should be for the wife's separate use; and asked, to what end she should *receive* the profits, if they were to be the husband's property the next moment. He added, that the word *enjoy*, was very strong to imply a *separate* use to the wife.

The words, to enjoy and receive.

(*a*) 2 Atk. 558.

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For the livelihood of the wife.

So also in *Darley* v. *Darley* (*a*), *Lord Hardwicke* is reported to have said that technical words were not necessary to create a separate trust for the wife, and that the word "livelihood" was sufficient to show the intention of the donor that the property should be to her sole and separate use. According to this opinion, if a devise were made to the husband, or a trustee for the wife's livelihood, the property would not belong to the husband, but to his wife as a feme sole. Again,

In *Lee* v. *Prieaux* (*b*), the testatrix bequeathed to *Ann Hill*, widow, for life, an annuity of £10, out of certain stock which she vested in a trustee; and she directed the surplus dividends to be paid to *Sophia Lee*, a married woman; she also ordered the whole dividends to be paid to *Sophia* after the annuitant's death, during *Sophia*'s life: and she declared that her trustee "should not be troubled to see to the application of any sum or sums paid to the said *Ann Hill* and *Sophia Lee*, *but that their receipts in writing should be sufficient discharges to her said trustee*," &c. *Lord Alvanley* was of opinion, that although the words "notwithstanding the coverture of *Sophia Lee*," were omitted, and no notice of her then marriage was taken, yet that the other expressions in the clause were sufficient to intitle the wife to the dividends as her separate property. His Honor observed, that two women were the objects of the testatrix's bounty; the one a widow, and the other a married woman. With respect to the former, the testatrix might have used these words as a caution

That the wife's receipt shall be a sufficient discharge.

(*a*) 3 Atk. 399. (*b*) 3 Bro. C. C. 382.

against any future husband having a right to the money; they must have their meaning, and that probably the testatrix might have inserted the words, "her receipt shall be a sufficient discharge," in consideration of *Sophia* being a married woman, who was in that situation, which otherwise prevented her giving such an acquittance; and that if these words had no meaning, the testatrix might as well have omitted them. His Honor was therefore of opinion, that there was a clear intent to be collected from the words of the clause, that the testatrix meant *Sophia*, though a married woman, should have the power to give a *discharge*, so as to bar her husband.

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The next case which occurs is *Hartley* v. *Hurle* (*a*). There the testator gave the annual produce of the trust fund created by his will, subject to debts, legacies, and annuities, &c., in trust for his daughter *Ann Hurle*, as therein mentioned, to be paid by his trustees *into her proper hands*; and *Lord Alvanley* said, he conceived that this was to her sole and separate use (*b*).

Payment directed into the wife's own hands.

So also in *Dixon* v. *Olmius* (*c*), the bequest was of a bond and mortgage debts to the testator's niece *B*, a married woman, with a direction that they should be delivered up to her *whenever she should demand or require the same*. The question was, whether these securities were to be considered as given to *B* for her separate use? And the Chancellor said, that as these securities were to be given up to *B on her demand*, her husband could not have obtained them

Or that securities for money shall be given up to her by the executors, on demand.

(*a*) 5 Ves. jun. 540. (*b*) See 18 Ves. jun. 434. (*c*) 2 Cox's Rep. 414.

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from the executors *without a demand made by B,* which gave her the *dominion* over them; they must therefore be considered as given to her *separate* use.

Instance at law of a trust raised for wife's separate use, against marital right of second husband.

In the following case the intention was considered to be sufficiently clear to raise a trust for the wife's separate use, against a second husband. Lands were devised to trustees, in trust to pay the rents and profits to his daughter *F*, for life, who was then married, or to such person as she should appoint, notwithstanding her coverture, but not into her husband's hands; with a direction that such rents and profits should not be subject to any control, management, or disposal of her husband, nor liable to any debts which he had or should contract: the same being expressed to be designed by the testator for the wife's separate use and benefit, and to be at her own disposal notwithstanding coverture, with remainder (after inserting trustees to preserve contingent remainders) to the issue male of *B* in tail, remainder to her issue female. *F*'s husband died between the date of the will and the making of the codicil after mentioned, and she married *G* after the testator's death. The codicil noticed the death of *F*'s first husband, and *confirmed* the will in all particulars not altered or revoked by it. Question, whether under the will and codicil, the separate enjoyment of the rents, &c., by *F*, was confined to the life of the first husband, or whether it was available against every *future* husband? And it was determined, that according to the true construction of the will and codicil, the latter expressly mentioning the death of the first husband, and still continuing the restriction, the testator intended that his daughter

should enjoy the lands free from the control of any husband (*a*).

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2. Expressions which have been held insufficient to raise a trust for the wife's separate use.

Construction of clauses according to which a trust for wife's separate use was not raised.

It must be observed, that Courts of Equity will not deprive the husband of his wife's property, to which he is by law intitled, unless the intention be clear that he was not to derive any benefit from it, and that it should be for the personal use and disposition of his wife (*b*).

Thus in *Brown* v. *Clark* (*c*), the testator bequeathed to his sister *A*, (a married woman) and to *B*, the interest of his residuary estate, in equal shares; and upon *A*'s death, half of the principal was to be divided amongst her children, of which the husband was to have no part, but it was to be entirely for the children; and if she had none alive, then the *sum* was to be equally divided amongst *B*'s children; and after the deaths of *B* and wife, the other half of the *principal* was to go in like manner amongst his children. It was contended on the part of *A*, that as it was expressed that the husband should have no part whatever, the bequest to the wife was a trust for her separate use; but *Lord Alvanley* was of opinion that those words were only applicable to the *principal* money, of which the wife had no share, and not to the *interest*, to a moiety of which she was intitled for life: the interest therefore being given to her

(*a*) Beable v. Dodd, 1 Term Rep. 193. See also title "Curtesy," vol. i. chap. 1, p. 20, et seq. (*b*) See chap. 1, and pages last referred to, also Rich v. Cockell, 9 Ves. 370, 377. (*c*) 3 Ves. 166.

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without qualification or restriction, it was subject to the right of her husband.

So, also, in *Dakins* v. *Beresford* (*a*), *B* devised property to *C*, in trust to sell, and out of the produce "to purchase, in his own name, an annuity of £80, for the life of the wife of *D*, and to pay the same to her and her assigns." *D*, although living apart from his wife, claimed the annuity; which demand was resisted, upon the ground that it was the intention of the testator that the wife should enjoy the annuity to her separate use, manifested in the direction to *C*, to purchase it in his own name, in trust for the wife of *D*; but the *Master of the Rolls* declared, that as there were no negative words in the will to exclude the husband, he could not deprive him of his legal right to the annuity.

It is observable in the last case, that the bequest amounted to no more than to a trust to pay an annuity to the wife for life. Such a bequest, therefore, did not afford that clear intention to exclude the husband from his marital right, as a Court of Equity requires for that purpose; the mere interposition of a trustee never having been held sufficient to manifest any such intent. Again,

In *Lumb* v. *Milnes* (*b*), *A* bequeathed his residuary personal estate to trustees, in trust to pay half yearly, a part, or the whole of the interest, upon a certain event, to his niece *B*, (the wife of *C*,) for life, and to apply the capital to such uses, &c., as *B*, *whether sole* or *married*, should appoint, as therein mentioned;

(*a*) 1 Cha. Ca. 194. (*b*) 5 Ves. 517.

and in case of no appointment, then to the use of *B*'s legal representatives, including *C*, if then living. The question was, whether under the above bequest, *B* was intitled to receive the interest of *A*'s residuary estate separate from, and independently of her husband, or whether his assignees (he having become a bankrupt) were intitled to it during her life. And *Lord Alvanley* was of opinion, that the words of the will were not sufficient to give the annuity to *B*'s separate use, and that therefore the assignees were intitled to it upon making a provision for her.

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This case appears to be the same in principle with that of *Brown* v. *Clark*, for there is no qualification nor restriction whatever in the direction as to the payment of the interest to the wife.

In another case, of *Jacobs* v. *Amyatt*, in a note to *Beresford* v. *Hobson* (*a*), the testatrix bequeathed the residue of her estate to or in favour of *B*, then a minor, and unmarried, to be placed at interest until she attained the age of twenty-one, or married; in either of which events she was to receive the capital, with the accumulations that were directed to be paid *to her, to and for her use* during her life, with limitations over. She married under age, and claimed the property as bequeathed to her separate use; but the Master of the Rolls, by whom the cause was first heard, decided against her claim in favour of the husband's marital right; and his Honor's decree was afterwards confirmed by the Chancellor upon appeal.

Equally insufficient is a direction to pay to her, to and for her use.

In two particulars the last case differs from those

(*a*) 1 Mad. 376.

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before referred to, where dispositions to the *sole* uses, or to the *separate* uses of the wives, were considered as sufficient to raise trusts for their separate uses. The first particular of difference is, that at the date of the will, *B* was unmarried; and the second, is the omission of the above restrictive expressions; and it seems that for the want of the words sole or separate, the expression "for her use," evinced no clear intention that the testator meant to exclude the right which a future husband might have in the fruits of the bequest. The immediately preceding direction to pay *to her*, &c., includes what follows, viz. "to and for her use;" so that the latter words are redundant, and mere repetition, a practice, or a mode of expression not unusual in the preparation of deeds and wills.

Or to and for her "own" use.

If the word *own* had been introduced in the last case, that addition would not, as it seems, have raised a trust for the wife's separate use; and so it appears from a manuscript note, upon a case of *Johnes* v. *Lockhart*, made by *Lord Colchester*, then a practitioner at the Chancery bar; a case decided by *Lord Alvanley*, and to be found in the Registrar's book, 1792, A. 439, *b*, as also in *Mr. Belt*'s edition of *Mr. Brown*'s Chancery Reports (*a*). *Lord Colchester*'s note is in the following words; "*Johnes* v. *Lockhart.*—Legacy to a feme covert to her *own* use and benefit, is *not* to her separate use; and *Master of the Rolls* said he would not go beyond *Lee* v. *Prieaux*, 3 *Bro.* 381. Legacy to husband and wife, but so as that husband should not dispose of it without her consent; this is to her separate use."

(*a*) 3 Bro. C. C. p. 383.

IV. Independently of the acquirement by the wife of separate property by the means before mentioned, she may do so by carrying on trade on her own separate account, apart from and without the interference of her husband. Her character as a feme sole trader under the custom of *London* has been before discussed (*a*). Her ability to carry on such business on her own individual account, now to be considered, does not arise from any particular custom, but in consequence of the express agreement between her and her husband *before* marriage, or from his *subsequent* permission. When the agreement is made *previously* to the marriage, since the consideration is valuable, the transaction will not only be obligatory upon the husband, but also binding upon his creditors. When the agreement originates *during* the marriage, it will be void against his creditors, but good against himself, for the reasons mentioned in a preceding chapter of this work, which treats of the validity of settlements made before and after marriage (*b*).

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Wife's separate trading under husband's agreement.

Validity against his creditors.

In order to illustrate the present subject, it will be proper to show how this privilege of the wife stands at law and in equity.

1. As to the *legal* power of the wife to carry on trade upon her separate account during the marriage.

Upon the abstract question of this the wife's ability, *Lord Mansfield* observed (*c*), "that whether by any means a man might before marriage put his intended wife in a situation to carry on a separate trade,

Wife's power at *law* to carry on a separate trade.

(*a*) *Suprà*, p. 126. (*b*) Vol. i. p. 285, *et seq.* (*c*) 3 Term Rep. 620, *in notis.*

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there was no authority that he might not do so." If, then, property be vested in trustees before marriage, to enable the wife to carry on business upon her sole account and for her separate use, the disability of coverture will be so far removed, that the transaction will be established against the husband and his creditors, and the separate character of the wife as a feme sole will be acknowledged; and for the reasons mentioned in the case next stated, it is unnecessary that the assigned articles should be enumerated or specified in a schedule annexed to the settlement, if they can be otherwise identified. In such a case, the trustee of the wife will be intitled to the property assigned, and to its *increase and profits*, for her sole and separate use and benefit.

The principle.

The law considers the wife as the *agent* of her own trustee, and her possession as his possession. Upon the application of these principles, the goods assigned and in the possession of the wife will be protected for her, and excepted out of the general rule of the common law, according to which a married woman can have no property during the coverture, but all her estate is vested in her husband: and upon the same principles, the goods assigned and in the *possession* of the wife will be protected against the operation of the statute of *James* the *first* (*a*), which vests in the husband's assignees in bankruptcy all such personal estate as at the time of his becoming a bankrupt should by the *consent* of the *true owner* be in the bankrupt's *possession, order, and disposition*, and of which he should be the reputed

Stock in trade the wife's separate property,

and protected against stat. of James I.

(*a*) 21 Jac. 1. c. 19. sect. 11.

owner, and take upon himself the *sale, alteration,* or *disposition,* as owner, &c.

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Thus, in *Jarman* v. *Woolloton* (*a*), by a settlement before marriage, reciting an agreement that the wife's stock in trade, book debts, &c. should be assigned to a trustee for her separate use and disposal, to the intent that she might carry on her trade at her own risk and charges, and for her own separate and exclusive benefit, she assigned to *A* all her stock in trade and other effects at, in, or about *C,* and all book and other debts then or afterwards to become due to her in the course of her business (of a milliner), and all other her monies and effects in her trade, in trust for her *separate use.* There was not any schedule of the property annexed to the deed or referred to; but of the furniture and some of the articles an inventory was kept by the trustee. For some time after the marriage, the wife carried on her trade separately, and in a different house from her husband; but latterly all her effects were removed to his house, and she carried on her business in a separate apartment. The husband paid the rent of the house, and was at the expense of fitting up the shop. The husband having become a bankrupt, the trustee brought an action of trover for recovery of goods and furniture which he claimed under the settlement for the separate use of the wife; but the jury found that the wife's business was not carried on separately from her husband, and therefore gave a verdict for the assignees as to the stock in trade, and a verdict for the trustee for the furni-

(*a*) 3 Term Rep. 618.

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ture. The latter of which verdicts having been unsatisfactory to the assignees, a new trial was moved for, upon the grounds that either the trust deed did not protect the property, or that the assignees were intitled to retain the possession under the statute of *James* the *first* (*a*). As to the first, the Court decided that the deed was valid, the husband and wife being parties to it, and that it protected the goods, &c. comprised in it for the wife's separate use; also, that the want of a *schedule* to the deed specifying the property assigned was immaterial, for it would have given no public notice or information, and it would have been only known to the persons interested in the settlement. As to the second point, the Court said, that the husband had not the order and disposition of the property *with the consent of the real* owner, to make the case fall within the statute; for the *trustee* was the legal owner, who never consented, and the wife's possession of the goods was as *agent* of such trustee. The Court, therefore, refused to grant a new trial.

In the last case, that of *Haselinton* v. *Gill* (*b*) was acknowledged, in which *Lord Mansfield* said, that wherever such a trust could be supported in equity, the trustee would be intitled in a Court of Law. That was a case of the assignment to trustees for the separate use of the wife by a settlement before marriage of a number of her cows, &c. and of the *increase* and *produce* from them. Some of the cows, and of their increase, were taken in execution for the husband's debt, and for which cows, &c. an

(*a*) 21 Jac. 1. chap. 19. (*b*) 3 Term Rep. 620, *in notis.*

action of trover was brought by the trustees, who recovered in the action not only the value of the cows, but of their *increase*. And with respect to the latter, *Buller*, J., said, it was the same as if the wife had paid the produce arising from the original cows to the trustees, and they had purchased the *other* cows, for she acted as the agent of her trustees. But *Lord Mansfield* observed, "that if the husband had carried on the trade in his own name, and contracted debts in it, that would have varied the case."

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In the above cases, we have seen upon what principle it is that a Court of Law by circuity changes in effect the character of wife into that of a single woman. That principle, however, does not apply even to transactions connected with the business, when the wife gives, negotiates, or takes securities *in her own name;* for, as it has been before observed, the common law vests all her personal estate in her husband; and the mode by which that is evaded by modern legal decisions inconsistency with the rule, is by considering the wife as the *agent* of the trustee. But that construction cannot be made against actual expression to the contrary. Accordingly, if she give, negotiate, or accept *securities* for money in business *in her own name*, whether her separate trading be in consequence of such or the like settlements before marriage, as above noticed, or with the husband's consent after marriage, the securities given or negotiated will be void, and those taken by her will vest in him, together with the right to receive the money; subjects which have been treated upon in former parts of this work (*a*). But

But in carrying on business wife cannot accept, negotiate, or give securities in her own name;

(*a*) *Ante*, pages 110, 128.

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if she use the *name* of *her husband* in these transactions, then probably they would be supported at law upon the presumption made in several other instances (*a*) of her having acted under *authority* from him.

In *Barlow* v. *Bishop* (*b*) a promissory note was made payable to, *or to the order* of *Ann Parry* (a married woman), who carried on business as a sole trader with the consent of her husband. The note was made payable to her in the course of her trade, and she indorsed it for value *in her own name.* The indorsee was not permitted to recover the amount of the note against the maker, because by the first delivery of the note it became vested in the husband, and she could not by indorsement in her own name transfer such interest; but *Lord Kenyon* said, that since the husband permitted her to carry on business on her own account, and the transaction of the note was in the course of the trade, if the wife had indorsed it in her husband's name, his Lordship was not prepared to have said, that that would not have availed, as many acts of that nature might be done by a power of attorney, and a jury might have presumed what was necessary in favour of an *authority* from her husband for the purpose.

yet *semble* that she may do so in her husband's name,

With respect to this doctrine at law, in regard to the validity of securities given by the wife when they are granted or accepted in *her own name*, and when in that of her husband, it is conceived that, in equity, securities given by or to the wife in her own name, for a debt which she is allowed to contract in respect of her separate property or separate

and that securities, although given or accepted in wife's name, will be good in equity.

(*a*) *Supra*, p. 110, *et seq.* (*b*) 1 East, 432.

business, will be established against herself in respect of such property, upon the principle of her power of acting as a feme sole, and her absolute dominion over such separate estate and concerns, as also upon the principle of a Court of Equity relieving against mistakes and mere forms; but this head of equity will be more fully considered in a subsequent part of this treatise.

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It may be inferred from the above opinion of *Lord Kenyon*, and what appears in prior parts of this work in regard to presumptions, that, at law, if the husband *after marriage* permit his wife to carry on business as a feme sole, her transactions in it with strangers will bind him, upon his *presumed* authority to her, to do all necessary and proper acts for the purpose of carrying it on, except when that presumption cannot be raised for such or the like reasons as mentioned in the last case (*a*). But at law the *profits* are the husband's, there being no trustees, no obstacle to interpose between the rule of law, which vests in him all the wife's personal property accruing to her during the marriage, and her equitable title to it as her separate estate under the permission of her husband.

When husband liable at law for wife's acts in carrying on separate trade with his permission.

This, however, is not so in equity, which leads,—

2. To the *equitable* doctrine upon this subject.

With respect to provisions made *previously* to marriage, for enabling the wife to carry on trade for her separate use, and the property is actually vested in trustees, the same rules prevail in equity as at law in regard to the husband, his creditors,

Rule or doctrine upon this subject in *Equity*.

(*a*) See also *supra*, p. 115.

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and her title to the stock in business and profits to her sole use, and which have been before mentioned. So, also, in settlements *after* marriage, when the property is transferred to trustees for the purpose before stated, the same rules prevail in both jurisdictions, and the like distinctions taken between those settlements that are founded upon a *valuable* consideration, and those that are merely *voluntary*, which have been before considered (*a*). But the difficulty originating in legal forms (when no trustees are appointed for the wife) which fetter the proceedings of Courts of Law, does not occur in equity; since, as has been shown, a Court of Equity will make the husband a trustee for her separate use. If, therefore, the husband *merely agree*, in articles before the marriage, that his wife shall carry on business on her own sole account; or, without any such agreement, if he *permit* her to do so afterwards, all that she earns in the trade will in equity be her separate property, and be applicable and disposable by her as such, subject to the demands affecting it.

So also it will be if the husband desert her, and she by the aid of her friends carry on a separate trade for her support.

Thus, in *Cecil* v. *Juxon* (*b*), *A*, the daughter of *B*, married *C*, who deserted her with two infant children, and went abroad, and was absent for fourteen years. *B*, the mother, intrusted her with a stock of goods, proper for the business of a milliner and broker, and permitted her to take the profits for the maintenance

(*a*) Vol. i. chap. 8. (*b*) 1 Atk. 278.

of herself and children. *B*, in the division of her property, assigned to her son *D* personal estate, desiring him to assist *A*, by lending her such of the said goods as were necessary to enable her to support herself and family; *B* also assigned to her grand-daughter *E*, the daughter of *A*, the residue of her property. *A saved £20* out of her separate trading, which she lent upon bond, and afterwards a like sum upon a promissory note, both of which were, contrary to her knowledge at the time, *made payable to C, her husband.* *C*, upon his return from abroad, possessed himself of the goods lent to *A* to trade with, and the produce of the stock, for the redelivery of which, and payment of principal and interest on the bond and note, the bill was filed by the wife, &c. And *Sir Joseph Jekyll* said, that, in consequence of the husband's desertion of his wife, the Court would consider the property acquired by her during his absence, to subsist herself and family, as her *separate property*, and not at the disposal of her husband. He therefore declared, that *A* was intitled to the goods which were in her possession, and to the stock in her separate trade *for her separate use;* also, that she was intitled to the bond and note, and decreed accordingly.

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Savings.

The next case upon this subject, is *Lamphir* v. *Creed* (*a*). There *A*, the wife of *B* (a soldier in a militia regiment, and residing with his regiment in a part of the kingdom at a distance from his wife), employed the plaintiff *C*, to purchase a sixteenth share

(*a*) 8 Ves. 599. This case, as stated, consists of what appears from the Report, and from a MS. in the possession of *Mr. Belt.*

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of a lottery ticket, in which she agreed that *C* should be equally interested with her. At this time *A* carried on the business of a green-grocer apart from her husband, but there was no evidence of any assent of her husband to her separately carrying on this trade for her own use, except what could be inferred from his separate residence. The ticket was drawn a prize, and *A* refusing to permit *C* to participate in the good fortune, *C* instituted the present suit to accomplish that object; but *Sir William Grant* dismissed the bill, observing, that the purchase money of the ticket was the husband's, that the wife was incompetent to pass his interest in any part of its profits or produce, or to bind him by any contracts in regard to such his property, except those which were incident to the trade, and that as the purchase money was the husband's, so must be what it yielded, so that the plaintiff's title was defective.

This case seems to have been decided under its peculiar circumstances; for the fact of the husband's assent to his wife's separate trading was not established, and his absence was not such from whence an implication could arise that he consented that his wife's carrying on business should be for her own separate use, consequently the transaction was open to all the observations of the Master of the Rolls, founded upon the disabilities of coverture. It is presumed, however, that a contrary decision would have been made, if the money expended in the purchase had appeared to have been out of savings from a trade carried on by the wife with her husband's permission for her separate use, since they are disposable by her as she thinks proper, and in which her husband has no interest in equity.

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With respect to the husband's liability *in equity* to the debts contracted by the wife in her separate trade, the following conclusions may be probably drawn:

Husband's liability in equity to wife's debts in her separate trade.

1. Whenever the wife is to be considered as acting as a *feme sole*, and intitled to the profits of her separate trade as her sole and separate estate, the husband will not be liable to her engagements contracted in it. And the creditor cannot complain, since he trusted to *her* credit only, and it would be unjust to subject the husband to her debts, when he is not intitled to any of the profits. If, therefore, the husband be liable at law (as was intimated by *Lord Kenyon*, in the case of *Barlow* v. *Bishop*, before stated) (*a*) for the wife's debts in trade carried on by her with his permission, without the intervention of trustees, upon the *presumption* of her agency for him, a Court of Equity will, it is conceived, interfere on his behalf, to prevent the prosecution of such a legal right, but at the same time subject the funds in the trade to the demands of her creditors.

2. When the property is legally vested in trustees to enable the wife to carry on trade for her sole and separate use, it is presumed, that the husband is absolved from all responsibility, even at law, for her debts contracted in it, and upon the presumption by which the law renders the husband liable in the instance before mentioned; for in such case the wife is the agent not of the husband, but of the trustee; the debts, therefore, are those of the trustee, and since he is *legally* intitled to the profits, he is legally

Liability of her trustee at law,

(*a*) *Supra*, p. 172.

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and in equity.

responsible for the debts of his agent (the wife), incurred in conducting it. Still, nevertheless, since the wife is in equity the only person *beneficially* interested, it is conceived that a Court of Equity, acting upon the same principle as in the instance of the husband, will protect the trustee from such his legal responsibility, and confine the creditors to the assets in the trade.

Wife trading under such agreement cannot be made a bankrupt.

3. It is now settled that no action can be maintained against a married woman. Since, therefore, no legal demand can be established against her, it is considered that, under the construction of the statute law regulating the issuing of commissions of bankruptcy, no commission can be supported against her as a separate trader, notwithstanding *Lord Apsley*'s decision in *ex parte Preston* (*a*), for this case differs from that of a *feme sole* trader in the city of *London*, the custom of which, as we have before seen (*b*), placing the wife at law in the situation of a single woman, enables her to make valid *legal* contracts, &c. and subjects her personally to answer for them.

(*a*) Green, 8. (*b*) *Ante*, page 126, et seq.

CHAPTER XIX.

THE WIFE'S POWERS OVER HER SEPARATE PROPERTY IN REGARD TO VOLUNTEER CLAIMANTS UNDER HER; AND THE INSTRUMENTS EXECUTING SUCH POWERS.

In the last chapter the marital rights of the husband were considered; and it is proposed to treat of the subjects arising out of the title of the present chapter, under the following sections:

I. *The wife's power, under* agreement *between her and her husband before or after marriage, to dispose, as a feme sole, of her freehold estates during the marriage, by deed or will, so as to bind* her heir.

II. *Her power to dispose of her real and personal estates in favour of* volunteers, *when such estates are limited to her separate use, but no express power of disposition is provided or given.*

III. *Of the instruments which will be a due execution of powers in favour of* volunteers, *given to the wife to appoint by deed or will* generally, *and also when certain forms and particulars are required by the powers to be added to those instruments.*

WIFE'S POWER UNDER AGREEMENT TO DISPOSE OF HER REAL ESTATE AGAINST HER HEIR.

I. It appears, from the authorities mentioned in the beginning of the last chapter (*a*), that if the intention were to give either real or personal estate to a married woman for her separate use, and the mode adopted for the purpose was by *limitation* expressly to herself, without the appointment of trustees (*b*), although the *form* be defective at law to accomplish the purpose, yet it will be supported in a Court of Equity, that Court converting the husband into a trustee of the property for the separate use of his wife. But in regard to *real* estate, it was unsettled previously to the case of *Wright* v. *Cadogan* (*c*) (finally determined in the House of Lords), and that of *Rippon* v. *Dawding* (*d*), whether the husband and wife by mere *agreement before*, and in contemplation of marriage, that she might dispose of *her* real estate by deed or will during the coverture, could enable her to defeat the right of her *heir*, after her death, by either of those instruments, since by descent of the *legal* estate he acquired a complete title at law. And it was doubted whether a Court of Equity could upon any principle affect the conscience of the heir, and oblige him to perform the agreement, since both the deed of a married woman without a fine and her will were void instruments from the disability of coverture, and the heir was not a party to the contract (*e*). *Lord Hardwicke* expressed his doubts upon the subject, in *Peacock* v. *Monk* (*f*), but the two

Agreement between husband and wife *before* marriage that she shall dispose of her *freehold* estates will bind her *heir*, and he will be a *trustee* for her appointee.

(*a*) *Ante*, p. 152. (*b*) For the form of an ante-nuptial settlement vesting the wife's real and personal estates in trustees to her separate use, see Append. No. 16. (*c*) 2 Eden. 239. 1 Bro. Parl. Ca. 486, S. C. (*d*) Ambl. 565. (*e*) See *supra*, p. 70. (*f*) 2 Ves. sen. 191.

cases before referred to, have removed all uncertainty upon the subject, in determining that a Court of Equity will consider the *heir* as a trustee, and oblige him to make a conveyance to the party in favour of whom the wife appointed the property.

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The principle applicable to the present case appears to be this; that the agreement having been made before marriage, at a period when the wife was able to contract; and as it clearly appears to have been the intention of the parties that the wife should reserve to herself a power to dispose of her own lands during the coverture, she, therefore, and the persons claiming under her appointment, have a right to the interposition of a Court of Equity to give full effect to the *marriage agreement*, and to remove any obstacles which, in point of form or otherwise, invalidated the appointment at law; the more especially since the wife might have obliged her husband to concur in a fine and settlement of the estates pursuant to his engagement, which a Court of Equity, according to its well-known practice, will consider to have been performed (*a*).

Such, then, being the rule of Equity in regard to the heir, upon an agreement between husband and wife *before* marriage, that she shall have a disposing power over her real estates when no conveyance of them to trustees is made for the purpose; a second question naturally follows, viz. whether the heir will be equally bound by such an agreement made *after* the marriage?

In answer to this question, it is to be observed

Contra if the agree-

(*a*) See Power v. Bailey, stated *infra*.

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ment were made *after* marriage.

that the before mentioned principle does not equally apply to an agreement after marriage as to one entered into before marriage, since in the former case the wife is disabled from entering into any contract in regard to her real property, either to bind herself or heir, and the husband's agreement can only be obligatory upon himself to the extent of his interest in the estate; so that the agreement in the present instance cannot, as it is presumed, bind the wife's heir, and convert him into a trustee of the *legal* estate, which he takes by descent, for the appointees of the wife. In *Dillon* v. *Grace* (*a*), *Lord Redesdale* marks the distinction between the two cases in these words: "In *Wright* v. *Englefield* (*b*), and all the cases of that nature, the question was, whether a feme covert not having actually conveyed her estate, but having *previous* to her marriage entered into a contract to convey to certain uses, that contract (even so far as it was a stipulation for her own benefit), should be considered as binding against her own heirs, in the same manner as the contract of any other person? A Court of Equity held that *her* heir was bound as she was bound herself. This question could not arise in the case of a *mere contract* to convey entered into *after* marriage; for the wife's mere contract after marriage would have been void, whether made for her own benefit or that of other persons."

And there seems to be no difference in the application of the

The above distinctions seem equally to prevail when the wife is *cestuique trust* of her real property, the legal estate being outstanding; because the

(*a*) 2 Scho. and Lefroy, 463. (*b*) Ambl. 468.

same rule is applicable to a trust as to a legal estate, equity following the law. In *Wright* v. *Cadogan* (*a*), *Lord Northington* observed "that there was no rule so certain, so general, and so strongly adhered to by the ablest judges who had presided in equity, as to observe *in omnibus* the rules of law with respect to the regulation of property, and that such rules had been always strictly observed as principles in a Court of Equity."

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rule if the wife be *cestuique trust*, and have not the legal estate.

If, then, the wife be *cestuique trust* in fee of real estates, and she and her husband, by articles in writing *before* marriage, agree that she shall have power to dispose of the trust property; her disposition will be good against her heir (*b*), as it has been shown to be in the instance first before mentioned, where the wife was seised of the legal estate.

But if the agreement be *after* marriage, as in the instance secondly before given, then, attending to the analogy of construction between legal and trust estates, such a contract would not have the effect of empowering the wife to appoint the absolute trust to the prejudice of her heir, who would be intitled to it at her death, if not disposed of by her in such a mode, as by law is allowed to married women to pass their estates during coverture.

And if the fee of lands be given to wife's separate use and *appointment*, there will be no merger,

With respect to real estates which may accrue to the wife during the marriage by deed or will, if no trustees be interposed, and the instruments express that the lands shall be to her separate use, and that she shall have power to dispose of them; although

(*a*) 2 Eden. 258. See also 2 P. Will. 713. (*b*) See Wright v. Englefield, Ambl. 468.

WIFE'S POWER TO DISPOSE OF SEPARATE PROPERTY WITHOUT SPECIAL AUTHORITY.

she take the legal fee, she may nevertheless appoint it, which will bind her heir and convert him into a trustee for the appointee, notwithstanding the case of *Goodhill* v. *Brigham* (*a*), which has been before noticed in considering the merger of powers (*b*).

although there be no trustees, and her heir will be a trustee. Courts of law have no jurisdiction in these cases.

The before mentioned agreements between husband and wife, respecting her power to dispose of her real estates, are merely of equitable jurisdiction, for being *executory*, neither they nor any executions of the powers intended to be given to her by them, convey *legal* titles. Since, therefore, a Court of law cannot intermeddle with equitable rights, there can be no redress for the appointees in that Court (*c*).

The proposition having been established, that whether real or personal estate be actually settled in trustees for the wife's separate use and disposal, or whether it rest merely in *agreement*, the trust or intent will be effectuated in equity with such qualifications as to the real estate as before distinguished, I shall next proceed to consider,

II. The wife's power of disposition over her real and personal estates in favour of volunteers, when such estates are merely limited to her separate use, and no express power of disposition is provided or given.

Difference between real and personal estate as to wife's power to appoint in the absence of express authority.

With respect to rents and profits of real estates, a gift of them to the wife for her separate use, enables her to dispose of them as a *feme sole* (*d*), in the same manner as she may do of personal estate so limited

(*a*) 1 Bos. and Pull. 193. (*b*) *Supra*, p. 105. (*c*) See *Lord Kenyon's* judgment in Doe v. Staple, 2 Term Rep. 695. (*d*) Hulme v. Tenant, 1 Bro. C. C. 16.

to her; but in the following respect there is a difference between the two estates, for a limitation of real estate to the wife in fee to her sole and separate use, without expressing more, will not enable her to dispose of it during the marriage otherwise than by fine or recovery, because no power having been given to her by the instrument to make any disposition of the property, she can only do so by the mode prescribed by the general law, and if she omit to do so her heir will take the estate.

WIFE'S POWER TO DISPOSE OF SEPARATE PROPERTY WITHOUT A SPECIAL AUTHORITY.

With respect to personal estate, it has been settled since the case of *Fettiplace* v. *Gorges* (*a*), that when personal property is actually given or settled, or is agreed to be given or settled to the separate use of a married woman, she may dispose of it as a *feme sole* to the full extent of her interest, although no particular form to do so is prescribed in the instrument for the purpose.

When a trust of personal estate is created for wife's separate use, she may dispose of the property without a special power,

In *Peacock* v. *Monk* (*b*), *Lord Hardwicke* said, "that where there is an *agreement* between husband and wife before marriage, that she shall have to her *separate* use either the whole or particular parts of her personal property, she may dispose of it by acts in her lifetime or by her will." But this observation applied to marriage contracts only to which the husband was a party; the general proposition applicable to all cases was that which was determined in *Fettiplace* v. *Gorges*. The principle upon which that decision was founded is this; that when once the wife is permitted to take personal property to her separate use as a *feme sole*, she must so take it with

(*a*) 1 Ves. jun. 46. 3 Bro. C. C. 8, S. C. and stated in the next page. (*b*) 2 Ves. sen. 191.

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all its privileges and incidents, one of which is the *jus disponendi.*

The case last referred to was to this effect. The husband, being embarrassed and obliged to go abroad, conveyed all his estates in trust to pay his debts, and an annuity of £200 to the separate use of his wife, and not to be subject to his debts or control. She was also intitled to £1000 stock under the will of *A*, bequeathed in trust for *her sole and separate use.* After the wife's death, a writing signed by her was found, by which she left all her personal estate and every thing belonging to her to *B.* The husband, being the survivor, claimed two sums of £1000 and £1900 stock, which were found at her death in the names of trustees for her sole and separate use. But *Lord Thurlow* dismissed the bill upon the principle before stated.

That case was followed by *Rich* v. *Cockell* (*a*). There £500, three *per cent.* consols, were, by the will of *A*, vested in trustees, in "trust, to pay, transfer, and dispose of the same, and every part of the fund, and also of the dividends, &c. for the *sole and separate use* and benefit of her daughter *B*, the wife of *C*, as she should direct or appoint," with a direction that *B*'s receipt should, notwithstanding the marriage, be a good discharge to the trustees, in the payment or disposal thereof according to her free will and pleasure. The husband obtained a transfer of the stock. *B*, his wife, made a will disposing of £400, part of the stock, for a transfer of which the suit was instituted by the legatee against the husband; and *Lord*

(*a*) 9 Ves. 369. See also, Wagstaff v. Smith, 9 Ves. 520.

Eldon decreed accordingly, observing, that the first will only expressed a trust for the wife's separate use, not determining as to the power of disposition whether by deed, or will, or other writing, but that the nature of her interest was settled, viz. that the trust being for her *separate use*, she was enabled to dispose of it by will as an incident to such interest, or she might have a power to dispose by an instrument not amounting to a will supported in that Court as a direction or appointment.

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Although doubts have been entertained as to the power of the husband, with his wife's consent, to pass her interest in *reversion* which might by possibility fall into possession during the marriage, as has been before noticed and considered (*a*); yet there is no doubt but that she may dispose of such an interest *in presenti* when it is settled to her *separate use*, and thereby become her *sole property*.

and without regard to the circumstance whether the property be in possession or *reversion*.

Thus in *Sturgis* v. *Corp* (*b*), money in the funds, in which *A* had a life-interest, was vested in trustees, in trust, after the death of *A*, to pay the dividends into the proper hands of *B*, for her *sole and separate use* for life, whose receipts should be good discharges; and after her death the capital was given to *C*. *D*, the husband of *B*, purchased *C*'s interest, and then *B* and *D* sold by auction their reversionary interests, *A* being still living. The purchaser, before he would complete his contract, required *B*'s consent in Court for the passing of her reversionary estate for life. And *Sir William Grant* said, that where property was settled to the separate use of a married woman, her

(*a*) *Ante*, vol. 1. p. 246. (*b*) 13 Ves. 190.

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examination was unnecessary. That if the principle was, that the wife is, as to that property, a feme sole, and has a disposing power as such, then *B* had as much a disposing power over her *reversionary* interest as over her interest in possession.

A case must be noticed which cannot be reconciled with those above stated, nor with the principle upon which they are founded. That case is *Whistler* v. *Newman* (*a*).

Upon the marriage of *Mrs. Newman*, £1200, 3½ *per cent* bank annuities (her property) were vested in trustees, in trust to pay the dividends into her hands for life, for her sole and separate use, and which were not to be liable to her husband's debts, &c. Her receipt too was declared to be a good discharge. The trustees sold the stock at the request of *Mr.* and *Mrs. Newman*, and paid to him, with *her consent*, the proceeds. He afterwards became insolvent, and died. The trustees then replaced the stock; and the question, so far as concerned the widow, was, whether, as the fund had been sold at her instance and request, she did not dispose of the dividends to which she was intitled to her separate use for life in favour of her husband? *Lord Rosslyn* decided in the negative, and that she was intitled to the dividends which had accrued since her husband's death. His Lordship's reasons were, because this case differed from the others on the subject that it was between the widow and her trustees, and not between her and her separate creditors, and that it was a breach of trust in her trustees to pay, even with her consent, the dividends to the husband.

(*a*) 4 Ves. 129.

The observations which occur upon the last decision are these: first, that the wife being to be considered a feme sole as to her separate estate, and having the unlimited power of disposition over it, might give it to whom she pleased, including her husband. The dividends, therefore, were in this instance, upon the principle of the case of *Fettiplace* v. *Gorges*, and the other cases, effectually given by the wife to her husband; and secondly, if she had such unlimited power of disposition, as is clearly established by those cases, and if she might, independently of her trustees, and without their concurrence, have given the dividends to her husband, as is also established in the cases of *Grigby* v. *Cox* (*a*), *Pybus* v. *Smith* (*b*), and *Essex* v. *Atkins* (*c*), their having acted in compliance with her request could not with justice be considered a breach of their trust or duty towards her. It is conceived, therefore, that this case is not now of any authority.

OF THE INSTRUMENTS NECESSARY FOR A DUE EXECUTION OF WIFE'S POWERS.

III. It is observable that in the cases before considered, no particular mode of disposition was prescribed for the wife to dispose of the personal funds settled to her separate use, consequently any appointment of them in writing was sufficient; we shall, therefore, proceed in the next place to consider those cases which, after limiting the property to the wife's separate use, expressly give her a power of appointment by *deed or will.*

Of the requisite instrument to execute a power to appoint by deed or will generally.

When a deed is required by the power, it must be a perfect deed, it must consequently be under seal and delivered, for a writing without a seal and de-

A deed.

(*a*) 1 Ves. sen. 518. (*b*) 1 Ves. jun. 193. (*c*) 14 Ves. 547.

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livery is not a legal deed (*a*). In regard to *personal* estate, a will, established to be such in the Ecclesiastical Court, will be a good appointment of it. But as to *real* estate, it seems to be settled that it must be such a will as is sufficient to pass freehold lands, i. e. duly attested by three witnesses, as required by the statute of frauds. This, however, has been disputed; but if, when a deed is required by the power, a technical one be necessary, the same reason equally demands a will to be effectual to pass freehold estates when the power generally authorises an execution by such an instrument; a writing, therefore, in the one case, and a will not duly attested in the other, would not, as it is presumed, be a good execution of the power.

A will.

Thus in *Longford* v. *Eyre* (*b*), *A*, upon her marriage, conveyed her real estates to trustees to such uses, &c. as she should by deed or will, or by any writing in the nature of a will, appoint. *A* executed a will in the presence of four witnesses, the regular attestation of which having been disputed without success, *Lord Macclesfield* said he much doubted whether the will would have been a good appointment had it not been executed according to the statute of frauds, because, added his Lordship, "when a power is given to appoint the uses of land by deed or will, the will must be intended such an one as is proper for the disposition of land, consequently subscribed by three witnesses in the presence of the testator; for the case is within all the inconveniences which the statute of frauds intended to prevent, and the other words,

A writing in the nature of a will.

(*a*) 2 Term Rep. 695. (*b*) 1 P. Will. 740.

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in the nature of a will, mean the same as a will, which must, therefore, be subscribed by witnesses in the presence of the testator."

Such was the deliberate opinion of *Lord Macclesfield*, which appears to have been acted upon by *Lord Thurlow* in *Duff* v. *Dalzell* (*a*).

In that case *A* bequeathed to his daughter, *B*, several shares in the *Sun Fire-Office*, and after her death "to such persons as she by will should direct." *A* also devised a moiety of his real and personal estates to *B* for life, remainder "to such person as *B* by will should direct." *B*, by will executed in the presence of two witnesses only, bequeathed the *Sun Fire shares*, and devised the moiety of the real estates. It was contended that the power was ill executed, at least as to the lands, because the will was not executed according to the statute of frauds. This objection seems to have prevailed with the Court, for *Lord Thurlow* said that the will, being sufficient to pass the *personal* estate, seemed a good execution of the power *so far*.

A power requiring to be executed by a *deed* is ill executed by a *will*, et *vice versa*.

If the power require an appointment by *deed*, it cannot be executed by a will, because a will does not answer the description of a deed (*b*); also if the instrument be a *will*, the power will be ill executed by a deed (*c*). But if the power be more extensive, and contain the additional words "or by any *writing*,

(*a*) 1 Bro. C. C. 147. (*b*) Earl of Darlington v. Pulteney, Cowp. 260. Doe v. Lady Cavan, 5 Term Rep. 567. Bushell v. Bushell, 1 Scho. and Lefroy, 90. (*c*) Reid v. Shergold, 10 Ves. 370, and Anderson v. Dawson, 15 Ves. 532, after stated.

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&c." that circumstance will authorise an appointment by *will* as well as by deed (*a*).

What evidence sufficient to prove will of wife made under a power.

To establish in evidence the will of a married woman made in execution of a power, probate of it in the Ecclesiastical Court is first necessary, in order to confirm judicially its testamentary nature (*b*). But the production of such a probate will not alone be sufficient to induce a Court of Equity to act upon it; for there are other special circumstances which may be required to give the instrument effect as a valid appointment, viz. attestation, sealing, &c. with which circumstances the temporal Courts have not trusted the judgment of the spiritual Court. The witnesses, therefore, to these facts, must be examined in chief to prove that the will was the wife's act, &c.; and if an attestation be not required by the power, still her signature must be proved (*c*).

All the formalities prescribed by a power must be attended to in its execution.

We have now arrived at that description of powers which, after specifying the instruments by which they are to be executed, require in addition particular ceremonies and acts to be observed in order to authenticate them, or to be as guards against fraud or surprise. Although these ceremonies may be perfectly arbitrary and unnecessary in relation to the legal validity of the instruments, yet as the donor or creator of the power is authorised by law to prescribe what terms he pleases to the effectual disposition of his property by the donee, such terms are as

(*a*) Kibbet v. Lee, Hob. 312. Tylle v. Pierce, Cro. Car. 376. Roscommon v. Fowke, 6 Bro. Parl. Ca. 158. This subject is more fully discussed *infra*. (*b*) Ross v. Ewer, 3 Atk. 160. (*c*) Rich v. Cockell, 9 Ves. 376.

laws, and they must be strictly, literally, and precisely performed and obeyed in order to a legal execution of the power.

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The power sometimes requires the *sealing* of the instrument only, and at other times the consent of two or more persons. What relates to these two subjects has been in part mentioned under the title of Husband and Wife's power of leasing (*a*); and in addition to what is there stated in regard to the necessity of actually fixing a seal, it must be observed that notwithstanding the case of *Strange* v. *Barnard* (*b*), which, as reported, seems to be to the contrary, it is presumed that consistently with common sense neither the circumstance of the paper being *stamped*, upon which the will in that case was written, nor that of the annexation of the sheets of paper by a *wafer*, as there also happened, can be equivalent to or dispense with the necessity of a seal; first, because sealing by such acts as these never was the intention either of the donor or donee; and secondly, because such a method of sealing is out of all practice and ordinary conception, and is destitute of that solemnity and effect belonging to an instrument under actual seal.

Sealing.

When the power requires actual signing or sealing, and the wife is from bodily infirmity prevented from performing either of these acts, it should seem that as the law does not require impossibilities, a performance *cy pres* must be of necessity admitted.

Signing.

Thus a mark instead of a name may probably be deemed sufficient in analogy to the signing of a will

(*a*) *Ante*, vol. i. p. 116. (*b*) 2 Bro. C. C. 585.

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in that manner under the statute of frauds, which requires the testator's signature (*a*).

So also guiding the hand in signing and sealing may be considered a compliance with the terms of the power upon the application of the maxim, *qui facit per alium facit per se*, but it should seem that this agency should be at the request of the wife executing the power.

As to sealing including signing, *et è converso.*

But signing will not include sealing, nor sealing include signing, as has been settled by modern authorities in contradiction to those of earlier date (*b*). The reason for it ever having been decided in the case of wills, that sealing included signing, is explained by *Lord Eldon* in *Wright* v. *Wakeford* (*c*), thus, "when it was urged that the legislature meant more than sealing; first, from the circumstance that sealing is not mentioned as to wills; secondly, that the legislature must have proposed some evidence from the hand-writing of the party, the objection was, that a person may sign by his mark, an act affording no material testimony; upon such reasoning, therefore, it was decided originally that sealing was signing." But in the case of *Lemayne* v. *Stanley* (*d*), there is this curious reasoning of three of the four Judges. "The putting of the testator's *seal* had of itself been a sufficient *signing* within the statute, *for signum* is no more than a *mark*, and *sealing* is a sufficient *mark*, *ergo* (the syllogism being complete) sealing must be a *bonâ fide* signing." This

(*a*) 29 Car. II. chap. 3, sect. 5. Harrison v. Harrison, 8 Ves. 185. Addy v. Grix, ibid. 504. (*b*) Lemayne v. Stanley, 3 Lev. 1. Cook v. Parsons, Pre. Ch. 184. (*c*) 17 Ves. 459. (*d*) 3 Lev. 1.

subtlety, however, ill accorded with the statute, and could not long survive; *Lord Eldon*, therefore, proceeds correctly to state the alteration which was made: "But upon a review of that (reasoning) the contrary (doctrine) has been held for a long time, and so far is sealing from being equivalent to signing, that it is determined that sealing is not necessary, and that sealing without signing is not a sufficient execution of a *will*, the converse holding as to a deed, which cannot be without sealing and delivery. If signed it may be a writing, but if delivered it may be a good deed whether signed or not, and if it be to be executed under a power with signature and sealing, *both* are required."

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A will not well executed by sealing without signing.

Sealing and delivery essential only to a deed.

The reason why sealing is not necessary to a will made in pursuance of a *general* power of appointment is, because sealing is not essential to the instrument called a will. If, however, a seal be specially required by the power, a will without a seal will not be a good execution of it (*a*).

But if the power require a seal to the will it must be fixed.

What we have been discussing related first to powers requiring appointments to be made by deed or will generally, and secondly, when signing and sealing were additionally prescribed, but without any direction that either of those acts should be done in the presence of witnesses or be attested by them. These two additional requisites will now be considered in their order.

As to attestations by witnesses required by powers.

When the appointment is to be made in the *presence* of witnesses, and the power requires no attest-

When omission in attestation of appointor's signature in *presence* of the witnesses will *not* be fatal.

(*a*) Dormer v. Thurland, 2 P. Will. 506. Ross v. Ewer, 3 Atk. 163.

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ation, if nevertheless the witnesses do attest in writing the execution of the instrument, and the attestation omit to state that the appointor executed the document in their presence, but the contents of the instrument declare that it was so signed, this omission will not vitiate the appointment, but it will be *presumed* from the declaration contained in the document that it was executed in the presence of the witnesses; and such a presumption does no violence to the power, since it does not require a written attestation to that fact.

Thus in *M'Queen* v. *Farquhar* (*a*) *A*, by his marriage settlement, had a power to appoint a considerable manor and estate in favour of the children of the marriage; "by any deed or deeds, writing or writings, to be by him *signed* and sealed in the *presence* of two or more witnesses, or by his will, &c." *A* by deed appointed this property to his eldest son, in which it was stated, that it was signed, sealed, and executed by *A* in the *presence* of three credible witnesses; but the witnesses subscribed a written attestation upon the deed to the sealing and delivery of it only, for which reason an objection was taken to the validity of the appointment. And *Lord Eldon* thus expressed himself, "Upon the question whether after execution it ought to be taken that *A* signed the deed in the presence of witnesses attesting the sealing and delivery, there would be a miscarriage in a judge directing a jury, if that fact were found, not to presume that the deed was *signed* in the presence of the same witnesses as it professed to be: that attestation therefore is good."

(*a*) 11 Ves. 468. 477.

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It is observable that the last case is no authority that if a power require the *attestation* of the witnesses to the signature, the attestation will be valid and support the deed if it omit to express that the appointor signed the instrument in their presence. This determination, therefore, is quite consistent with the cases that will be presently adverted to, which have determined and settled that an appointment will be void at law under a power requiring the attestation of witnesses to the appointor's signature in their presence, if such attestation take no notice of that fact. That *Lord Eldon* considered his decision in the above case to extend no farther than as has been ascribed to it upon the facts disclosed appears from his own criticism in the subsequent case of *Wright* v. *Wakeford* (*a*). His Lordship's comments upon *M'Queen* v. *Farquhar* were these. "The power actually exercised by the deed upon which the question arose was to be exercised in the presence of witnesses, but it was *not required expressly* to be *attested* by witnesses. The deed, said to be an execution of the power, was upon the face of it expressed to be executed in the presence of the witnesses, and so far from determining that attestation of the sealing was an attestation of the signing, I merely said, there would be a miscarriage in a judge if he did not direct the jury to presume that the deed was signed, as *it professed* to be on the face of it, in the presence of the witnesses who attested the sealing and delivery: a way of putting it that, so far from deciding, expressly avoided the question, whether attestation of the sealing and

(*a*) 17 Ves. 457.

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delivery is to be taken as attestation of the signing also."

When omission in attestation of appointor's signature will be fatal.

When the power requires the signing and sealing of the appointor to the instrument to be *attested* by witnesses, in that case if either (*a*) of these ceremonies be not noticed in the attestation, it will vitiate the appointment; for the terms of powers (as it has been before observed) are laws prescribed for the rule and guidance of the appointor, which must be literally and strictly pursued and obeyed, or the appointments will be void at law.

And the defect cannot be remedied by a subsequent attestation.

The defect in the attestation cannot be remedied by the witnesses afterwards concurring and signing a *new* attestation, because the execution and the attestation of the instrument ought to be one transaction, completed at the same time, as is usual in the execution of all instruments that require attestation. Such, therefore, it is to be inferred to have been the intention of the donor of the power, and not an attestation to be made at a future period, which, if allowed, might be extended to any indefinite time after the transaction, and would be attended with great inconvenience.

This question was settled in *Wright* v. *Wakeford* (*b*) upon a case sent out of Chancery to the Court of Common Pleas. The power was that "*A* and *B* and the survivor and his heirs, &c. might with the consent and approbation of *D* and *E*, or the survivor, testified by any writings or writing under their and his hands and seals or hand and seal, *attested* by two or more

(*a*) 6 Taunt. Rep. C. P. 402. (*b*) 17 Ves. jun. 457. 4 Taunt. Rep. C. P. 213.

witnesses, sell and convey, &c." The power having been exercised in the presence of two witnesses, the memorandum of attestation upon the deeds merely stated the *sealing and delivery*, and was silent as to the signing. The defect was attempted to be remedied after the death of *A*, the appointor, (who had survived *B*) by the witnesses signing another memorandum upon the deeds, which expressly stated that the instruments were *signed*, as well as sealed and delivered, by the several parties in the presence of the witnesses. But the Judges (except *Mansfield*, C. J.) certified that the power was not at the first well executed from the silence of the attestation as to the signature of the deeds in the presence of the witnesses, and that the *subsequent* attestation did not remove the objection, for the reasons before given.

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The last case was approved of by the Court of King's Bench in *Doe* v. *Peach* (*a*). There the premises in question were settled to such uses, &c. as *B* and *C* should during their joint lives, "by any deed or writing, deeds or writings, under both their hands and seals, to be by them duly executed in the presence of, and to be *attested* by two or more credible witnesses, from time to time appoint." This power was in fact executed by *B* and *C* as required, but the attestation by the witnesses was defective in this, that it expressed only the sealing and delivery of the deed of appointment, omitting altogether the signing of the instrument by the appointors. To remedy this omission, the same witnesses after the death of *one* of the appointors subscribed a new at-

(*a*) 2 Maule and Selw. 576.

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testation upon the deed, expressing that such deed was signed as well as sealed and delivered by *B* and *C* in the presence of the witnesses. In order to distinguish this case from the last it was contended for the appointee that as the power was worded the deed might be duly executed in the presence of two witnesses, without the parties putting their hands and seals to it in the presence of such witnesses, so that the attestation might be good without its being extended to the *signing* of the parties; but this subtlety was deservedly rejected by the Court, which said, that to make a due execution of the power there must be the making of an instrument with all the forms required by the power, and that there must be an *attestation* of its execution with *all* those forms; and that the intention of the parties was, that the *attestation* should be *co-extensive* with the things required to be done, which brought the present within the last case, and the Court expressly denied that it was a legal consequence that the attestation of the sealing and delivery of a deed was an attestation of the signing of it. The determination was against the validity of the appointment, and the Court was of opinion, that the omission in the original attestation was not supplied by the second, made after the death of one of the parties.

The Court of *King's Bench*, in the late case of *Wright* v. *Barlow* (*a*), persevered in the doctrine laid down in the two last cases, which it is presumed may be considered to be now settled as before mentioned.

(*a*) 3 Maule and Selw. 512.

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The last case which has occurred upon the present subject is *Doe* v. *Pierce* (*a*), in which a manor and lands were limited, after the deaths of *A* and *B* his wife, to the use of their children, as *A* "should by any deed or deeds, writing or writings, under his hand and *seal*, and *attested* by two or more credible witnesses, direct or appoint." *A* exercised his power by will, which purported to have been signed and sealed by him in the presence of three witnesses, but the memorandum signed by them merely attested the *signing* of the instrument. At the trial of the cause *C*, one of the subscribing witnesses, was produced, who proved his own signature to the attestation, and the signatures of the other attesting witnesses, and said, he believed that the seal was affixed to the will at the time of the execution of that instrument by *A*, and of the attestation of the witnesses. But *Gibbs*, C. J., determined against the validity of the appointment, observing that it was impossible to distinguish the case from that of *Wright* v. *Wakeford*.

Although his Lordship said nothing upon the admissibility of the *parol* evidence which had been produced in the cause, or of its effects if admitted, these questions were discussed at the bar; and it was contended that the defect in the attestation could not be supplied by evidence *dehors* the instrument, for if it might, then the consequence would be, that the title would be good during the lives of the witnesses, and it would be defective upon their deaths.

(*a*) 6 Taunt. 402.

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As to the admissibility of parol evidence in these cases.

The admissibility of parol evidence in these cases may probably depend upon the following circumstances:—

1. If the power merely require the signing and sealing of the appointor in the *presence* of witnesses, since an attestation is not a requisite of such power, and consequently there is no necessity for the subscription of any such by the witnesses to give validity to the appointment; it is presumed that parol testimony of the signing and sealing of the instrument by the appointor in their presence is admissible. So also, when the witnesses happen to attest the sealing or signing of the appointment made under such a power, if they omit to notice either of those acts as having been done in their presence, it is conceived that the defect may be supplied by parol evidence, or presumed by a jury. In *Wright* v. *Wakeford* (*a*), *Lord Eldon* expressed an opinion to the following effect: "that if a signature were actually found at the bottom of the deed, and the jury would find that act as done in the presence of witnesses, he would not say that would not do. But that if attestation at the time were required, it could not be presumed where there was no signature, although the signature which was there might be presumed to have been in the presence of witnesses, yet not appearing to be so," from the attestation; and upon this principle and the statement in the appointment, the case of *M'Queen* v. *Farquhar* (*b*) appears to have been determined.

2. But if the power require that the solemnities

(*a*) 17 Ves. 459. (*b*) 11 Ves. 468—477, and stated *supra*, p. 196.

of signing and sealing the instrument by the appointor should not only be in the presence of, but *attested* by the witnesses, then if they omit to make such attestation in writing at the time of the appointment, or having made one, they neglect to notice in it either the signing or sealing of the instrument by the appointor, parol evidence to prove either the one or the other cannot be admitted. With this agree the foregoing cases of *Wright* v. *Wakeford* (*a*), *Doe* v. *Peach* (*b*), *Wright* v. *Barlow* (*c*), and *Doe* v. *Pierce* (*d*).

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The statute 54 George III. (*e*), which remedies defects in attestations from omitting to notice the signatures of appointors in the presence of the witnesses, has effect in retrospect only; its intention being merely to confirm preceding titles which had been approved by professional men under the mistake that *sealing* included *signing*, and that therefore an attestation expressive of the former included and attested the latter. It follows from the limited operation of the act, that since the thirtieth day of July 1814, the day on which it passed, the omissions in attestations of signing or sealing by appointors, when the powers require those acts to be attested, will be equally fatal as they were prior to the statute.

Stat. 54 Geo. III. c. 168.

(*a*) 4 Taunt. 213. (*b*) 2 Maule and Selw. 576. (*c*) 3 Maule and Selw. 512. (*d*) 6 Taunt. 402. (*e*) Chap. 168, passed the 30th of July 1814.

CHAPTER XX.

EFFECTS OF THE WIFE'S *VOLUNTARY* GIFTS AND APPOINTMENTS OF HER SEPARATE ESTATE UNDER POWERS.

UNDER which title will be considered—

I. *The construction and different consequences of the wife's voluntary gifts and appointments in instances where she has a* mere power *to dispose of the capital, and when she takes the* absolute interest *in it. And*

II. *Instances where the wife must appoint according to the* terms *and* forms *of the power, in order to dispose of the property in favour of* volunteers; *also instances in which the execution of her power is unnecessary; and the wife's acts, regarding her separate property, in favour of her husband; and the effect of her acquiescence in his receipts of it.*

I. Having in the last chapter cleared the way to effectual executions of powers of appointment given to the wife, according to their terms, and the ceremonies required by them, both in regard to the instruments, and to the proper attestations by the witnesses, when attestations were necessary, it will now be attempted to ascertain and point out when it will and when it will not be *necessary* for the wife to execute the powers so given to her; but the result of these inquiries depends upon the distinction,

when from the effect of the gift or limitation of the property to her, she takes an estate for life only to her separate use, with a power to dispose of the capital, and when (although the fund be *apparently* given to her so as merely to authorise her power over it by appointment), the limitation will amount to a gift of the absolute interest in the property without the necessity of executing such power. It is, therefore, necessary to ascertain when the limitation merely gives to the wife a partial interest with a power of appointing the capital, and when the limitation, although in the *form* of a power, nevertheless gives to her the absolute interest.

WHEN THE WIFE TAKES FOR LIFE ONLY WITH A POWER OF APPOINTMENT.

1. It is settled that where there is an express limitation *for life*, with a power to dispose by will, the interest is equivalent only to an estate for life, and the power is to be executed, *primâ facie* at least, by will. If the party die, the interest ceases with the life, and no one can take by transmission of interest from that person, although he or she may have transmitted the property by an execution of the power. The principle is this, that a partial interest having been *expressly* given, it will not be permitted, contrary to the intention expressly declared, to be enlarged by implication.

When wife takes for life only, with a power to appoint;

Thus *A*, being seised in fee, devised his lands to his wife *for life*, with a direction or power to give the same after her death to whom she would: the Court held that she had an estate for life only, with a power of disposition (*a*).

And in *Bradly* v. *Westcott* (*b*), *A* bequeathed to

(*a*) Anon. 3 Leon. 71. (*b*) 13 Ves. 445, 451.

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absolutely, qualified and guarded only during the coverture in respect of her situation as a married woman, and to prevent the fund upon her death becoming the property of her husband as her administrator, in the event of his being the survivor. Of this class the case last stated may be considered one.

In *Hales* v. *Margerum* (*a*), *A* gave to his executors £1000, in trust *for the sole and separate use and benefit of his daughter B,* and not to be liable to the debts, &c. of her then present or any future husband; and that all *interest* which should become due after the testator's death should be paid to *B* for her own separate use and benefit only, whose receipt, notwithstanding coverture, should be a good discharge; that whenever *B* died the £1000 should be absolutely in her own *power* to dispose of by her will, or any deed or writing purporting to be her last will, to any person or persons, &c. notwithstanding her coverture, at her death or any other restriction. But in default of any such disposition or appointment, then the £1000 should belong to the testator's grand-daughter *C. Lord Alvanley,* M. R. held that *B,* under the above limitation, took an absolute interest in the £1000, and that it passed by her will as her *own* property, and not under the power. Upon this case it is observable that the first trust declared of the money was absolute in favour of the wife for her separate use, and that the subsequent qualifications were merely added in consideration of her then state of coverture, and were not intended to abridge the absolute interest first given to her. This distinguishes the present from the former cases.

(*a*) 3 Ves. 299. 470.

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The case of *Heatley* v. *Thomas* (*a*) is similar in principle to the last, and arose upon a settlement by which the wife's legacy of £2000, and her annuity of £150, were vested in trustees upon trust for the sole and separate use and benefit of the wife *during* the then intended marriage between her and *B*, the *interest* of which was to be paid half-yearly during the coverture to the wife's proper hands for her sole use and benefit; and it was declared that she might *during* the marriage, by her *will* in writing, or any writing purporting to be her *will*, signed by her and attested by two or more credible witnesses, give or dispose of the £2000 and the interest, to such person or persons, &c.; "and that if she *died* before her husband, *B*, and without disposition as aforesaid, then that upon her death before *B*, the same was to be divided according to the statute of distribution, in case she had died intestate and unmarried." The wife and her husband joined in a bond as a surety for *C*, who having become a bankrupt, the question was whether the obligee could affect the wife's separate estate? And *Sir William Grant*, M. R. decided in the affirmative.

The reader will have noticed that the property settled was the wife's; that the first trust declared of it was for her separate use *absolutely* during the coverture, and that the special power of disposition and restrictions were merely added from the consideration of her situation as a married woman during the coverture; she, therefore, had absolute dominion over the property for her *separate use*, and then, as we have seen (*b*), such a dominion without any

(*a*) 15 Ves. 597. (*b*) *Ante*, page 185.

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special power of disposition enabled her to *charge* or dispose of the fund absolutely as a *feme sole*; so that without reference to the power in this case she was at liberty to charge her separate estate, and having done so by bond, there was no objection to the payment of the debt out of such estate. This subject, however, will be afterwards more particularly considered.

Having shown when the limitation merely gives to the wife a *partial* interest, with a *power* of appointing the capital, and when the limitation, although in the *form* of a power, nevertheless gives to her the absolute interest for her separate use, without regard to the execution of such power, it is presumed that from attending to the distinct principles upon which these two classes of cases are founded, an apparent contradiction among them may probably be reconciled, i. e. with respect to some of them requiring the wife's appointment according to the precise terms of the power to dispose of or charge her separate estate, whilst others of them vest the absolute property of the funds in her, without the preliminary of any such appointment.

In order to show that according to the above two principles or distinctions, all or the majority of the cases upon these subjects may be reconciled, and are properly decided, we shall proceed to consider,

When wife's appointment necessary in favour of volunteers.

II. The instances where the wife must execute her power according to its terms and forms, for the purpose of passing the property limited to her separate use, in favour of *volunteers*, and when such execution is unnecessary (*a*).

(*a*) With respect to *Creditors*, see next chapter.

1. When (as in the first class of cases before stated and referred to), property is given or limited to the wife's separate use for life, with a power to dispose of the capital in a particular form, as by deed or will, her interest being for *life only in the income*, with an annexed power to dispose of the *capital*, the case falls within the law regulating the execution of such powers, which has been before mentioned. It seems, therefore, necessary for her to appoint by such instrument and with such ceremonies as are required by the power in order to pass the absolute interest in the property.

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Thus, in the following case (*a*), *John Slee* bequeathed £500 to trustees, to pay the *interest* to his wife for *life*, and after her death in trust, as to the *capital*, for such persons as she by deed or instrument in writing, executed as therein mentioned, should appoint; and the testator directed that the bequest should be void unless his wife released her dower within six months after his death, which she did not do. Under the circumstances of the case, *Lord Alvanley* decided that the power was not well executed by the will of the wife not referring to it; and said, that she had a mere *power* of disposition, and that had she, prior to her death (which was within six months after surviving her husband), released her dower and intitled herself to the £500, the sum must have been placed at interest, and the dividends paid to her for life, after which event the capital would have been disposed of according to the *mode* pointed out by her *husband's will*, in case she had executed her power.

(*a*) Croft v. Slee, 4 Ves. 60, 64.

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In that case, therefore, the Master of the Rolls had no doubt that the wife, in order to dispose of the principal money, could only do so by the execution of the power as directed by the will of the husband.

So also in *O'Keate* v. *Calthorpe* (*a*), *£4099 old South Sea annuities* and other funds, were transferred by marriage articles to trustees, in trust to permit the wife to receive the profits to her separate use, and if she survived, to transfer the whole to her; but if she died before her husband, then to transfer the property *according to her appointment*, by deed or will; and in default of appointment, to the issue, and if none, then to the husband and the wife's brother, in moieties. She made no appointment. Upon a bill praying that part of the funds might be applied as the wife should appoint, the Court said, that *if* she had any power over the principal, let her *make an appointment*, the effect of which would be considered; but till then the Court would not interfere.

It has been shown, upon a prior occasion (*b*), that if the wife had appointed as above suggested, the appointment would have had no effect upon the capital fund during the marriage, nor at its termination, except she died before her husband. The case, however, manifests what the Chancellor considered to be the law of the Court in the year 1739, when the decree was made, viz. that when the wife took for life, with an absolute power of appointment, the Court would not decide any thing in regard to the capital, except upon her appointment under the power.

(*a*) 8 Ves. 177. (*b*) Vol. i. p. 250, et seq.

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Reid v. *Shergold* is the next case I shall mention(*a*). The testator devised his copyhold estates to trustees, in trust for the sole use and benefit of his niece *B*, for *life;* and the trustees were directed to pay the rents and profits, or suffer *B* to receive them for her own use, notwithstanding her marriage, and after her death the estates were to be in trust for the sole use and benefit, and for the maintenance of *B*'s daughter *C*, who was to have a conveyance of them at twenty-one, or upon the death of *B*; but if *C* died before twenty-one, then he gave the premises to such person or persons as *B* by her *will*, to be duly executed, should appoint. The trustees were empowered to sell the premises at the request of *B*, and the proceeds were to be invested, and they and the capital were to be upon the same trusts as before declared of the estates. And as to the testator's residuary real and personal property, he devised the same to his nephew *D*. The daughter *C* died under twenty-one, and before *B*, her mother; who having made a will under her power, and afterwards surrendered the legal estate of the copyholds (which she had previously acquired from the sole acting trustee) to a purchaser, in consideration of an annuity, *Lord Eldon* decided these three points; first, that *B* only took an interest for life, with power to dispose of the inheritance by *will* only, as required by the power. Secondly, that the surrender was a revocation of the will; and thirdly, that the surrender could not be considered an execution of the power; his Lordship observing, that the testator did *not mean* that *B* should

(*a*) 10 Ves. 370—380.

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so execute her power; on the contrary, that he intended that she should give by *will*, or not at all; and that it was impossible to hold that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power which the testator meant to remain capable of execution to the moment of *B*'s death, can be considered in equity an attempt in or towards the execution of the power. His Lordship therefore decided that the purchase could not stand; as also for another reason, viz. that the consideration being an *annuity*, could not either at law or in equity be said to be within the intention of the power.

To the same point is the case of *Bradly* v. *Wescott* (*a*), before stated.

The last case necessary to be cited upon this occasion, is *Anderson* v. *Dawson* (*b*). There £600 stock were vested in trustees, in trust for them to receive the *dividends* during the life of *A*, and to pay the same to her and her assigns, notwithstanding her coverture, for her sole and separate use *for life;* and after her death to transfer and pay the *capital* stock and dividends to such person and persons, &c., as *A*, notwithstanding coverture, in and by her last *will*, in writing, or by a writing in the nature of her will, to be executed, &c., should direct or appoint; and in default of appointment, &c., then in trust for *A*'s next of kin, according to the statute of distribution. *A* having survived her husband, called for a transfer of the £600 stock, under the idea that she was then absolutely intitled to receive it, notwithstanding the

(*a*) 13 Ves. 445, et *ante*, page 205. (*b*) 15 Ves. 532.

inference to the contrary arising from the limitation to her of the *dividends* only for life, with a power to appoint *the capital by will*; but *Sir William Grant*, Master of the Rolls, said, that *A* was merely intitled for *life*, with a power of disposition by *will*, and that therefore he could not decree that the trustees should transfer to her, or according to her direction, and he dismissed the bill.

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From the cases before stated, the following conclusions may be drawn; that when the wife takes an *express* estate *for life* in the fund, with a power to appoint the principal after her death, and the ultimate limitation is to a *stranger*, or to *her next of kin*, in such instances the wife can only dispose of the capital by an execution of her power, which may be immediate if the power authorise a deed; but if it require the appointment to be made by *will* only, the disposition cannot take effect till after the appointor's death (*a*), and the wife is precluded from making an *immediate* disposal of the fund (*b*).

Corollary from the cases before stated.

When the power confines the disposition to a *will*, the wife cannot make an irrevocable disposition.

Sockett v. *Wray* (*c*), determined by *Lord Alvanley*, is also an authority to the latter purpose; and although the decision has been disputed, yet it is conceived that the principle acknowledged in *Reid* v. *Shergold*, and *Anderson* v. *Dawson*, before stated, supports the decree. The trusts declared in *Sockett* v. *Wray*, were that the trustees should from time to time during the life of *A*, the wife of *B*, pay the dividends of £1234 *three per cent. consols*, into the proper hands of *A*, for her sole and separate use, and after her death, upon trust "to transfer the *capital* to such

(*a*) *Ante*, page 191. (*b*) Doe v. Thorley, 10 East, 438.
(*c*) 4 Bro. C. C. 483.

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person or persons, at such time and times, in such parts, &c., and in such sort, manner, and form, subject to such powers, provisoes, conditions, restrictions, and limitations as *A*, by herself alone, whether sole or covert, and notwithstanding her then present coverture, during her life, by her last *will and testament*, in writing, or *any writing purporting to be her last will and testament*, to be by her signed and published in the presence of, and attested by two or more credible witnesses, should give, bequeath, direct, or appoint." The ultimate limitation in default of appointment was to *A*, her *executors* or *administrators*, for their own use and benefit. *Lord Alvanley* held that the wife could not by deed or other irrevocable act dispose of the *capital* fund, but only by an ambulatory and revocable act, viz. by a will, or any instrument in the nature of a will.

The reader will have observed that the power does not authorise an appointment by any instrument except a will, or a writing purporting to be a will: this observation seems to obviate *Lord Eldon*'s criticism upon this case in *Sperling* v. *Rochfort* (*a*); for under the power the wife had no option to execute it by a revocable or an irrevocable act; the appointment was to be made by *will*, or by a *writing in the nature of a will*, and not by a deed, or by any writing which was immediate and irrevocable, but the instrument was to be one of which probate would be granted by the Ecclesiastical Court. Such, as above, was the ground of the decree, and as it is conceived, sufficiently solid to support it.

(*a*) 8 Ves. 176.

The reader's attention is requested to the circumstance, that in the cases before stated upon the present subject, with the exception of *Sockett* v. *Wray*, the ultimate limitation of the property, in default of the wife's appointment, was not to herself, but to a stranger, or to her next of kin; because it has been intimated in some of those cases, that although an express estate be given to the wife's separate use for *life*, with a power to dispose of the principal, yet, if in default of appointment, such principal be limited to her *executors* or *administrators*, and not to her next of kin, the absolute interest in the fund will vest in her, and be disposable with her husband's concurrence, without resort to the particular power given her for the purpose. The principle for the distinction is this; that in the first case the wife is to be considered complete mistress or owner of the property, the effect of such limitation being compared to that of a limitation to her right heirs, which, in the instance of real estates, vests the absolute inheritance; but that in the second case, the limitation to the wife's *next of kin* being the same in effect as that to *particular* heirs, which, if the subject were lands, would not pass the fee to a donee or devisee, will not therefore vest the absolute interest in personal estate in the wife, and consequently, that in order to dispose of the capital, the wife must have resort to her special power.

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Semble, that appointment is necessary, whether the ultimate limitation in default of appointment be to wife's executors or administrators, or to her next of kin.

It is however submitted, that this analogy between real and personal estates is not applicable to the subject now under consideration; but that when the limitation in default of appointment is to the wife's *executors* or *administrators*, it will be required that

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she should execute her power in order to dispose of the fund during her marriage (*a*).

The reasons are these; admitting the limitation to impart to the wife the absolute interest in the fund, yet she being a married woman, the effect of such a limitation to her is quite different from a similar one to a man or to a *single* woman; for in the instance of such a limitation to a married woman who is under a legal incapacity to dispose of property during coverture, there is no repugnancy nor inconsistency between a limitation to her of the absolute interest, and a particular power of disposition over it during the marriage, as appears in a former part of this work relating to powers (*b*), and also under the title "*curtesy*," where it is shown that an equitable interest for the wife's *separate use for life* in real estate, and the ultimate limitation to her of the fee simple, do not unite in such a manner as to merge the particular estate and extinguish the special limitation to her separate use for life (*c*). The analogy, therefore, mentioned in the commencement of these observations, is inapplicable to limitations to married women, and it does not authorise the conclusion that when the wife has an estate to her separate use for life in personal property, with a power of appointment, and the absolute interest is limited to her if she do not execute the power, she has, in analogy to similar limitations of real estates at law, such an absolute estate as of necessity enables her to dispose of the property without regard to her special autho-

(*a*) See vol. i. p. 252. (*b*) *Supra*, p. 105, &c. (*c*) See vol. i. p. 23.

rity to do so. This necessity, therefore, not existing, and when the settlor's intention in giving such a power is considered, as also the anxiety of a Court of Equity to protect the wife's property against improvident dispositions of it from restraint, &c., during the marriage, it seems but reasonable that when an *express* estate *for life* in personalty is limited to her for her separate use, with a power of appointment, and in default of its execution to her, her *executors* or *administrators*, the same appointment should be considered necessary as has been decided to be so when the ultimate limitation in default of appointment is to her *next of kin* (*a*).

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A case must be adverted to, in which *Sir Thomas Plumer* (then Vice-Chancellor) held that a limitation of personal estate to a widow in her husband's will during life, with a power of appointment after her death, and in default of such disposition *to* her executors or administrators *for their own use and benefit*, did not vest the absolute interest in the widow, but that she had an estate for *life* only, with a power to dispose of the fund, upon the principle that the executors or administrators took as *purchasers* in their own rights, and not by representation.

A fortiori, an appointment is necessary when the executor or administrator takes by purchase, and not by representation.

The case alluded to is *Sanders* v. *Frank* (*b*). *A* bequeathed to his wife *B* a leasehold estate for life, and he gave a moiety of it after her death to such person or persons, &c. as she should by *will duly executed* and *attested*, or by a codicil to her will appoint, and in default of appointment he gave the

An instance.

(*a*) See Anderson v. Dawson, stated *supra*, p. 214. (*b*) 2 Mad. 147. 155.

When wife's regular appointment necessary to intitle a volunteer to her separate estate.

same moiety *to* the executors or administrators of *B* for *their own use and benefit.* *B* after surviving *A* made a will, which was neither signed, sealed, nor attested, and without an executor being named; but administration, with a copy of it annexed, was granted by the Ecclesiastical Court. The Vice-Chancellor, after declaring that the widow took such interest in the leasehold as before mentioned, said it had been observed that a gift of personal estate *to* a person, his executors or administrators, was equivalent to a gift to such person and his heirs of real estate, and that it was so because each disposition carried the whole interest; but that in this case the bequest being *to* the executors or administrators, *for their own use and benefit,* gave them the property beneficially, and not as trustees; that a gift *to* the heirs of *A B* of lands was no gift to *A B,* and by the same analogy a gift of personalty *to* the executors or administrators of *A B for his and their own use and benefit,* was no gift to him. The decision was, that the will having been neither executed nor attested was a void execution of the power, and that the property belonged to the widow's administrator by purchase, and not by representation.

Deduction from the cases.

From the authorities which have been stated, the distinction between mere power and property has been established; and it appears that it is necessary, in the first case, that the wife should execute her power, in order to pass the property to which such power applies; and that, in the second, no such necessity exists.

When wife's trustees not necessary parties to appointment.

It must be remarked, that where an appointment by the wife is necessary, the trustees acting on her

behalf need not to join as parties to it, unless their concurrence be expressly required by the power (*a*).

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What has been said in this section is confined to the powers of dispositions by married women of the absolute interests in the *capitals* of the funds; but it sometimes happens, that a wife is only intitled for life to *interest* or *rents* of the property to her separate use; and it has been before noticed, that if no particular power to dispose of them be given, she may do so under her general power as a feme sole (*b*). It is also conceived, that such general power will not be suspended by any particular mode prescribed in the instrument limiting to her the property, upon the principle that the wife, having such a general power resulting from the estate for life given to her separate use, she may dispose of that interest under such general power (except she be restrained by express words from alienating by anticipation), or she may dispose of it in the particular manner prescribed by the special power. Upon this principle, it would seem, *Sir William Grant* decided the case of *Chesslyn* v. *Smith*, after stated (*c*), and which principle appears to be the same as produced the decisions in *Elton* v. *Shephard*, *Hales* v. *Margerum*, and *Heatley* v. *Thomas*, before stated and referred to (*d*).

As to necessity of wife's appointment of her separate interest for life, when a *particular* power is prescribed for her to do so.

If, therefore, the interest of a fund be directed to be paid as *A*, a married woman, should appoint by note or writing under her hand, and for want of such appointment then into her own hands for her

(*a*) 1 Ves. sen. 518. Essex v. Atkins, 14 Ves. 547, stated *infra*. Pybus v. Smith, 1 Ves. jun. 189, 193. (*b*) *Ante*, p. 184.
(*c*) 8 Ves. 183, stated *infra*. (*d*) pp. 207, 208, 209.

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separate use for life, it is conceived that *A* may dispose of it either by anticipation under her general power incident to her life estate, or by the particular mode prescribed by the special authority (*a*).

2. I must now observe, that although the wife be considered as a feme sole in regard to her separate estate, and is authorised so to deal with it, and may therefore appoint it to her husband (*b*), yet this doctrine seems to admit of qualification in regard to transactions with her husband relative to such property. This appears to have been *Lord Rosslyn*'s opinion in *Milnes* v. *Busk* (*c*), in which he refers to *Pawlet* v. *Delaval* (*d*), the only case he had been able to find where the question arose directly between husband and wife, and he ascribes the determination of it to particular circumstances, observing that it was clear from *Lord Hardwicke*'s reasoning, and the pains he took to collect all the circumstances, that his Lordship did not entertain an idea that in the *common case* of a married woman having separate property she could to *all* intents and purposes be placed upon the same footing as a feme sole. The subject may, perhaps, be considered thus: In transactions between husband and wife, relative to the separate estate of the latter, she, *primâ facie*, will be viewed in the light of a feme sole, and as such be competent to dispose of it to him, or for his use, subject to proof of fraud or undue influence on his part (*e*). To this effect *Lord Hardwicke* ex-

(*a*) See Witts v. Dawkins, 12 Ves. 501. Brown v. Like, 14 Ves. 302; and Bullpin v. Clarke, 17 Ves. 365, stated *infra*. (*b*) 11 Ves. 222. And see the forms of wife's appointments by deed and will, in Append. No. 17 and No. 18. (*c*) 2 Ves. jun. 498. (*d*) 2 Ves. sen. 663. (*e*) See Essex v. Atkins, 14 Ves. 542.

pressed himself in *Grigby* v. *Cox* (*a*), which is countenanced by what *Lord Rosslyn* said in *Milnes* v. *Busk* in regard to the practice of the Court of Chancery, viz. "that he had been informed it was *very constantly* the course of the Court, and particularly at the *Rolls* where these causes came on, that where the trustees oblige the party to apply to the Court, it had not established a deed between husband and wife upon her separate estate without her actual presence in Court (*b*)." Upon this declaration of *Lord Rosslyn* the Solicitor-General observed, that *Sir Thomas Sewell* had said, that if trustees would not take upon themselves to act, but compel the parties to file a bill, they cast their discretion upon the Court, which would not act for them without the presence of the wife. The presence, however, of the wife in Court, upon an appointment of her separate estate either to her husband or to strangers, is not necessary in order to pass her separate interest (*c*), since she is to be considered as a feme sole, with the like complete power of disposing of her property; but it seems that, when such transactions come before Courts of Equity, they will require the wife's presence, and (if necessary) direct inquiries into such transactions, to ascertain their fairness, and the circumstances under which the wife was induced to concur in them (*d*), *Lord Thurlow*, in *Pybus* v. *Smith* (*e*), observing "it

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Necessity of wife's appearance in Court when her *appointee* is obliged to have resort to equity to enforce the appointment.

The Court will, if necessary, direct inquiries into the transaction.

(*a*) 1 Ves. sen. 518. (*b*) Upon this subject see vol. i. p. 243. (*c*) Upon this point see Lord Eldon's observation in Sperling v. Rochfort, 8 Ves. 182; also Sturgis v. Corp, 13 Ves. 190. (*d*) Parkes v. White, 11 Ves. 231. (*e*) 1 Ves. jun. 194, stated *infra*.

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was very fit, in the case of a married woman, that the Court should know how she had disposed of her property."

When the Court will and will not supply wife's defective execution of power in favour of her husband.

3. With respect to defective appointments made by husband and wife to each other, there is this distinction, viz. that an imperfect appointment made by him to her will be good in equity (*a*), but a defective appointment made by her to him will not in general be remedied by that Court.

Accordingly, if the wife have a power under a will to appoint by an instrument signed by her, to be attested in the presence of two witnesses, and she appoint the fund to her husband by a writing attested by one witness only, the appointment will be void at law, and no relief can be obtained in equity.

In *Moodie* v. *Reid* (*b*), the Court said, that if the power were not well executed, it would not relieve the husband; that equity had already gone a great way in these cases, and had supplied defective executions of powers in favour of a wife, a child, a purchaser, and creditors, but not beyond these instances; and that if the Court were to go farther it would not know where to stop.

If, however, the appointment be made to the husband before, and in consideration of marriage, and in pursuance of a power previously given to the wife, in that case, if the execution of the power be defective, a Court of Equity will remedy the mistake; because the husband does not claim as a volunteer, but as a *purchaser* under the marriage contract.

(*a*) Tollet v. Tollet, 2 P. Will. 489. (*b*) 1 Mad. 521. 2 Mad. 156.

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Thus, in *Sergeson* v. *Sealey* (*a*), *A*, by settlement upon a first marriage, was empowered to charge her own estate with £4000, for such persons as she should, by *deed* or *will* duly executed in the presence of three witnesses, appoint. *A* having this power, and being about to marry *B*, a second husband, *declared* in articles of settlement, that *B* should raise £2000 (part of the £4000) for his own use, and *B* covenanted to convey lands for securing the money, but in trust as to the rents for himself during his and *A*'s joint lives, and then to raise the £2000 for the younger children of the marriage. The articles were executed by *A*, in the presence of *two* witnesses only; and the question was, whether they were a good execution of the power? *Lord Hardwicke* was of opinion in the affirmative, and said, that although it had been insisted that the articles were a defective execution of such power, because there were only two witnesses to them, yet the Court would supply that defect where the execution of a power was for a *valuable* consideration, much more where the execution was of a trust only; and that notwithstanding the appointment was in this case inaccurately expressed, and in an informal manner, yet it should amount to a *grant* of the £2000 to *B*, and if so, then that *B* was intitled to have the whole use and benefit of the money during the marriage; that the case fell exactly within the reason of *Lady Coventry*'s (*b*), where a tenant for life, with a power to make a jointure, *covenanted* for a valuable consideration to execute his power, the Court would supply a defective or a

(*a*) 2 Atk. 413. Ed. by *Sanders.* (*b*) 2 P. Will. 222.

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non-execution of the power against the remainderman.

It clearly appears that the last case was decided in favour of the husband, upon the principle of his being a purchaser. It therefore by no means authorises the general proposition, that a husband is intitled to the same equity as a wife or child, in regard to having defective executions of powers supplied through the medium of a Court of Equity.

Wife's acts amounting to a *gift* of her separate property to her husband.

4. Since the wife may appoint and dispose of her separate property as a *feme sole*, so she may *give* it to, or permit her husband to receive it, which will preclude her right after his death to charge his estate with what he so received. This was acknowledged by *Lord Hardwicke*, in *Pawlet* v. *Delaval* (*a*), in which case he decided, that *Lady Pawlet* having, during the joint lives of herself and husband, permitted him to call in, manage, and dispose of her separate estate as his own, and after his death treated by acts such her separate property, as assets belonging to him, discharged the original limitation of it to her separate use, and gave it to her husband.

In *Smith* v. *Camelford* (*b*), the Court declared, that if the wife permitted her husband to receive the rents of her separate estate, he was not afterwards accountable to her for them. The same decision was pronounced in *Milnes* v. *Busk* (*c*), the wife having expressly empowered her husband to receive the rents of her separate estate during her life. *Powell* v. *Hankey* (*d*), is a case where a similar decree was

(*a*) 2 Ves. sen. 663. (*b*) 2 Ves. jun. 698. 716. (*c*) 2 Ves. jun. 488. (*d*) 2 P. Will. 82.

pronounced upon her permission and acquiescence in her husband receiving the produce of her separate property; and in *Squire* v. *Dean* (*a*) the husband received the interest of his wife's separate estate, and applied it to the use of the family; her assent to the receipt and application was presumed, and she was not permitted to claim any thing on account of it out of her husband's assets.

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But if no such consent be given nor can be presumed, instances of which have been produced in a preceding page (*b*), then the wife will be intitled to reimbursement out of her husband's estate for the whole of what he received of her separate property, as in *Parker* v. *Brooke* (*c*). Yet in an instance where she was supported by him, and insane, and he received her separate estate, for which his own property was liable to answer (because his wife, so circumstanced, could neither authorise nor consent to his taking her separate estate), still, in consideration of his maintaining her, he was allowed in discharge a proper sum for what he expended in her support. The instance alluded to occurred in the *Attorney-General* v. *Parnther* (*d*).

Wife's rights upon husband's estate for his receipts of her separate property.

It cannot escape the observation of the reader that the principle which pervades the cases upon the subject is this; either *express* gift by the wife to her husband, or an *implied* gift to him (when it can be raised), of her separate estate, resulting from cohabitation and her acquiescence.

Upon this presumption it is, that if the wife with-

(*a*) 4 Bro. C. C. 326. (*b*) *Ante*, p. 132. (*c*) 9 Ves. 583, stated *infra*. (*d*) 3 Bro. C. C. 441. 4 Bro. C. C. 409.

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out intermediate claim suffer her husband to receive the annual income of her separate estate, a Court of Equity will permit her, surviving him, to charge his assets in account with no more than the amount of one year's arrears, or for one year of his receipts preceding his death, according to some cases, and not even with one year's receipts or arrears according to others.

If notwithstanding the *dicta* in some of the cases, a distinction may be considered to exist between property settled to the wife's separate use *aliunde*, and pin-money settled upon her by her husband, all or the majority of the cases may probably be reconciled.

Probable distinction in regard to such rights between arrears of pin-money, and husband's receipts of wife's separate estate.

Thus, if the wife expressly or impliedly authorise her husband to receive the interest or rents of her general separate property during his life, this being a gift, there can be no reason to give her any part of them which accrued during his life. With this agree the before mentioned cases of *Smith* v. *Camelford*, *Powell* v. *Hankey*, and *Squire* v. *Dean*, and also *Whistler* v. *Newman* (*a*), and *Dalbiac* v. *Dalbiac* (*b*) after stated. But when the property settled is that of the husband or the wife, and he is under contract to pay to her annually a certain sum as pin-money, considered to be for her *personal* use, and a provision by him, in such a case as it may be detrimental to her to carry implied acquiescence on her part to the extent of excluding her claim to this provision up to her husband's death, it does not seem unreasonable that she should be allowed one year's arrears pre-

(*a*) 4 Ves. 146. (*b*) 16 Ves. 126.

vious to that period, and so the Court has considered in the cases referred to below (*a*).

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5. As the gift or acquiescence of the wife will intitle her husband to her separate estate, so will her *consent*, given and recorded in a Court of Equity, have the same effect (subject to the distinctions after mentioned), whether such property be in the immediate possession or power of trustees, or in remainder or reversion (*b*).

Effect of wife's consent in Court to devest herself of her *separate* property without an appointment.

The taking of the wife's consent to the passing of her personal estate, not settled to her separate use, has been mentioned in a prior part of this work (*c*); what remains to be said upon the subject of her assent applies to personal property which she is possessed of or intitled to for her *separate use*, over which she has the *jus disponendi generally* (*d*) as a *feme sole*, or a special power to appoint.

The principle upon which the Court acts in these instances is this, that the wife, being considered a *feme sole* as to the property, and having an absolute interest in it either in the whole or in part, may dispose of it as she pleases. Hence it follows that her appointment, when one is required, can only be dispensed with (as it has been observed (*e*)) when she takes such an absolute interest as before mentioned. If therefore she be possessed of an interest for *life* to her separate use, with a power of appointing the capital by deed or will, the Court will not, in the

(*a*) Townshend v. Windham, 2 Ves. sen. 7. Peacock v. Monk, 2 Ves. sen. 190. Offley v. Offley, Pre. Ch. 26. (*b*) Sturgis v. Corp, 13 Ves. 190, stated *supra*, p. 187. (*c*) Vol. 1. p. 243. (*d*) See *supra*, p. 185. (*e*) *Supra*, p. 206.

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absence of appointment, order the property to be transferred either to herself or to her husband upon the authority of her consent (*a*). And although the limitation in default of appointment be to her, her *executors* or *administrators*, it will make no alteration in favour of the application, because such limitation does not vest in the wife the absolute interest in the fund, as it has been shown (*b*). For the like reason, when the life interest of the wife to her separate use is so given as to restrict her power of disposition of the dividends to accrue *in futuro* (which it is conceived can be only done by express declaration that she shall not dispose of them by *anticipation* (*c*), or by special trust as to application when the provision is by the husband for his wife on separation, as in *Hyde* v. *Price* (*d*)), the Court will not act upon her consent to pass, surrender, or charge such her interest.

But when the wife takes an *absolute* interest in the funds qualified only during the coverture, on account of her condition as a married woman (instances of which have been before produced (*e*)), then it is presumed, that since she has in such cases complete dominion over the property, as if she were a single woman, without regard to such qualifications, the Court would order it either to be paid or transferred to herself or to her husband with her *consent*, without regarding the circumstance of no appointment having been made, although one of such qualifications gave her a power to make one, because the absolute

(*a*) *Supra*, p. 211. See Anderson v. Dawson, 15 Ves. 532. (*b*) *Ante*, page 217. (*c*) This restriction considered, *infra*, p. 236. (*d*) 3 Ves. 437, and considered, *infra*. (*e*) Page 207.

interest having been given to her as a feme sole, she in that character is enabled to dispose of the funds independently of any special power.

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Upon the same principle, if the wife be intitled to the *interest* of the fund for life to her separate use with a prescribed power to dispose of it, and upon her death the capital is given to her husband; in such case, if they file a bill in Chancery praying that the principal may be immediately paid to her husband, and she *consent* to part with her life estate, the Court will order the fund to be paid or transferred to him.

Instance of the trust fund being ordered to be paid to husband with wife's consent.

Thus, in *Chesslyn* v. *Smith* (*a*), *A*, by deed, reciting that he was desirous of making a provision for *B*, his wife, during her life, directed the trustees named in it to invest £500 in three *per cent. consols*, in trust to pay the interest during *A*'s life, in such manner as *B* should appoint by any note or writing under her hand, and notwithstanding her then marriage; but in default of such direction to pay the same into her hands for her sole and separate use; and after her death, if *A* survived her, upon trust for him, his executors and administrators; but if he died before her, then to pay the principal according to his appointment, and if he made none, then upon trust for himself, his executors, &c. The £500 were invested by the trustees, against whom *A* and *B* filed a bill praying a transfer to *A* for his own use and benefit, upon his giving to the trustees his personal security. *B* consented, and *Sir William Grant* decreed according to the prayer of the bill.

(*a*) 8 Ves. 183. To the same effect see Clarke v. Pistor, cited 3 Bro. C. C. 568, and stated *infra*, p. 238.

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The reader will have observed that there is a particularity in the last trust; it is not limited, in the *first* place, to the wife's separate use for life, but it orders the interest to be applied as she shall direct by *note* or *writing* under her *hand*, and in default of such direction, then upon trust to pay it into her own hands, &c. But all this amounts to no more than a trust for the wife's separate use for life; and she having, as incident to such an estate, a power of disposing of it *ad libitum*, such power superseded the particular mode prescribed, so that the Court must have considered a compliance with it *in specie* unnecessary, and therefore no impediment to the relief which was prayed.

The like principle, which authorises the Court to dispense with the wife's appointment, and to order, with *her consent*, a transfer of her separate estate to her husband, will induce it, on the authority of the same consent, to order the funds to be applied in payment of his debts.

When upon the bill of husband and wife, and her consent, the Court will order her separate estate to be applied to pay his debts.

Thus, in *Allen* v. *Papworth* (*a*), *Lord Hardwicke* held, that if a married woman, having power to receive the profits of an estate to her separate use, and to appoint them as she pleased, filed a bill jointly with her husband for an account, and submitted that the profits should be applied in payment of *his debts*, and for which a decree was pronounced, such a bill, to which she was made a party without collusion, was as much an execution of her power, as an actual appointment would have been, and the profits would be bound by the decree.

(*a*) 1 Ves. sen. 163.

Lord Hardwicke must be understood to have applied the expressions, that a decree upon the wife's consent in a suit in which she and her husband were plaintiffs, was equivalent to an actual appointment by her, to a case where a married woman had such an interest in the property to her separate use as she could dispose of independently of any special power; for in such an instance her *consent* alone is sufficient to pass her separate interest, and such consent being given and confirmed by decree, these two acts, his Lordship said, were equivalent to an actual appointment; such was the case of *Allen* v. *Papworth*. The wife took an estate for life to her separate use in the profits of lands, the law enabled her to dispose of them as a feme sole, she might therefore consent to part with them to the creditors of her husband (*a*). But when the wife takes no interest in the capital, but a power only to dispose of it, in such case (as it before appears (*b*)), nothing less than an actual appointment will be sufficient, and the Court will not act upon a bill filed by her and her husband without a previous appointment, because such a bill is considered as that of her husband only (*c*), and therefore incapable of amounting to the express and deliberate appointment of his wife (*d*).

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And when not.

(*a*) Chesslyn v. Smith, *supra*, p. 231. (*b*) *Ante*, page 211. (*c*) 2 Ves. sen. 666. (*d*) 8 Ves. 177. And see vol. 1. p. 250, et seq.

CHAPTER XXI.

RESTRAINT OF WIFE'S DISPOSING POWER BY ANTICIPATION; AND THE RIGHTS OF HER CREDITORS UPON HER SEPARATE ESTATE.

HAVING shown that a married woman may dispose as a feme sole of personal property settled to her separate use, whether it be in possession or reversion, it is proposed to consider in this chapter—

I. *What will be sufficient to restrain the power which the law imparts to the wife to dispose by anticipation of her separate estate as a feme sole.*
II. *The rights of her* general *creditors upon her separate estate.*
III. *The effect of her appointments to intitle* particular *creditors to a satisfaction of their demands out of her separate estate, including sales to purchasers.*
IV. *When she is intitled to be relieved against such her contracts.*
V. *As to her separate character in equity in regard to proceedings by or against her.*

I. In preceding parts of this treatise have been noticed some of the alterations which have been made in modern times in the wholesome rule of the common law; according to which rule a married woman was disabled from disposing of either real or per-

sonal estate during the marriage, with the exception of the former by fine, and of the latter with the privity and concurrence of her husband. But now the doctrine of the wife's disposing power as a feme sole forms, in a Court of Equity, one of its most extended and complicated systems.

RESTRAINT OF WIFE'S DISPOSAL OF HER SEPARATE ESTATE BY *ANTICIPATION.*

It having been once established that a married woman might lose that character, and act at law by circuity through the intervention of trustees as a single woman, in regard to real or personal estate settled to her separate use and disposition, a Court of Equity, disengaged from legal forms, went further, and held that it would supply the omission of trustees, and raise a trust upon the apparent intention, so that whether there be trustees or no trustees appointed, a married woman is now competent at law or in equity (although contrary to the rules and principles of the general common law) to take and dispose of property limited to her separate use as a feme sole. The application of this doctrine to the various modifications of the rules of property has not only been the occasion of great expense and much litigation, but also of considerable perplexity and embarrassment, since many of those rules were found to be inconsistent with the subsisting relation between man and wife. These perplexities and difficulties were so severely felt that the Judges, in the great case of *Marshal* v. *Rutton* (*a*), restored the common law to a certain extent. Previously to that case, Courts of Law were rapidly advancing towards the establishment of the general proposition, that all the disabilities of the wife during the marriage,

(*a*) 8 Term Rep. 545.

RESTRAINT OF WIFE'S DISPOSAL OF HER SEPARATE ESTATE BY *ANTICIPATION.*

which the common law created for the wisest reasons, were completely merged in the new principle, that a wife was to be considered as a feme sole in regard to her separate property, for it was determined that she might contract so as to bind her person, might sue and be impleaded as a single woman, and might be taken in execution, &c. But the case referred to swept away all such consequences drawn from the above principle. The principle, however, still remains, and the consequences to be deduced from it in equity, in regard to the restraint of the wife's general power of totally disposing of her separate estate, will be one of the subjects considered in this chapter. It must be noticed that much diversity of opinion prevailed in this matter; some persons contending that the wife's general power of alienation over her separate property might be restricted by the settlor's intention *inferred* from the language of the instrument, whilst others insisted that nothing less than an *express declaration* that the wife should not have such a general power would have that effect. The latter opinion has been confirmed by modern authorities, as will be shown before we proceed to consider what has been determined to be insufficient to restrain such general power. Whether this restraint could be effected even by express negative words appears to have been originally doubted, upon the ground of its being repugnant to the interest which the wife took in the property; but in *Miss Watson*'s settlement, in which *Lord Thurlow* was a trustee, the words, "and not by anticipation," were by his advice inserted, and *Lord Alvanley* thought the clause to be a good one, and it has been so con-

As to restraint of wife's general power to dispose of her separate estate by *anticipation.*

Express declaration that wife should not dispose by anticipation of her separate estate necessary to deprive her of that power.

sidered ever since; and last of all by *Lord Eldon*, in the case of *Jackson* v. *Hobhouse* (*a*).

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In that case £6000 were vested in trustees to permit the wife to receive the interest for life to her separate use, &c. with a proviso against her assigning or otherwise disposing of such interest in any mode of anticipation. The husband and wife assigned the interest to secure an annuity to *B*, in which *C* joined as a surety. *C*, having been obliged to pay some arrears of the annuity, filed a bill against the trustees for reimbursement out of the wife's separate interest, and for the application of the residue in paying *C*'s annuity in future, and for an injunction to restrain the trustees from disposing of the £6000 and interest. This injunction having been obtained, *Lord Eldon*, upon a motion to dissolve it, said it was too late to contend against the validity of a clause in restraint of anticipation, and he dissolved the injunction. His Lordship also expressed an opinion that if the wife had been guilty of fraud by concealing the clause of restraint, the circumstance could not have improved the situation of the surety in enabling the wife to dispose of her separate interest contrary to the express declaration of the settlor.

The doubt which at first prevailed as to the validity of express declaration that the wife should not dispose of her separate interest by anticipation, affords strong evidence that nothing less will have that effect. And it has been frequently determined that where the interest has been directed to be paid from *time to time* into the *proper* hands of the wife, such direction was insufficient to prevent her having an absolute

Direction to pay the interest limited to wife's separate use for life 'from time to time'

(*a*) 2 Meriv. 483.

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disposing power over the income, before the arrival of the periods for her own proper receipts of it. In *Parkes* v. *White* (*a*), *Lord Eldon* considered it to be settled by the authorities, that all the words usually found in limitations to the separate uses of married women, as to pay the interest or rents into *their own hands,* and *from time to time,* &c. amounted to no more than gifts to their separate uses, leaving them at full liberty to dispose of the income as they pleased.

to her or 'into her proper hands' will not prevent her total and absolute alienation.

The insufficiency of a direction to pay the interest or rents from time to time to or into the hands of the wife, to restrain her power of disposition by anticipation, will appear from the case next stated, and also from others which will be referred to.

In *Clarke* v. *Pistor* (*b*), decided at the Rolls in the year 1778, the trust was "to pay the dividends of £2000 *bank stock* to such persons, &c. and in such manner and form as the wife should from *time to time* during her life, notwithstanding her coverture, by any note or writing under her hand appoint, and in default of appointment, into *her proper* hands for her separate use, &c." and after her death to transfer the capital to her husband. Upon the bill of the husband and wife against the trustees, she having made no appointment, the Court, with her consent, ordered a transfer of the fund.

The last case is an instance of the words "from time to time" not having the effect of restraining the wife's power of disposing of her estate limited to her separate use in the case of a *voluntary* gift made by her, but several of the decisions arose upon questions between her and her creditors, which will

(*a*) 11 Ves. 222. (*b*) Stated 3 Bro. C. C. 568.

be afterwards detailed. These cases uniformly support her absolute right of alienation, notwithstanding the occurrence of the words "from time to time" in the direction of payment of the interest to her. The cases are *Pybus* v. *Smith* (*a*), *Witts* v. *Dawkins* (*b*), and *Browne* v. *Like* (*c*).

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It was before observed, that express declaration that the wife should not dispose of her separate income, was presumed to be necessary in order to take away her general power of alienation over it, and which proposition, it is submitted, has been proved by the authorities stated in this section. There is, indeed, a case of *Hovey* v. *Blakeman* (*d*), which imports a contrary doctrine, and that mere *inference* of an intention will be sufficient to restrain the wife's power of disposition incident to her separate estate. It therefore requires particular attention.

The case of *Hovey* v. *Blakeman*, importing a contrary doctrine, considered.

The question in that case arose upon a *petition*, and for that reason may not have been so fully considered, as if it had been discussed upon a bill. The trust was, "to pay the rents and profits, dividends and interest, to arise from the fourth part of a residue, in equal divisions into the *proper hands* of the testator's two sisters for their lives to their separate uses." *Sir William Grant* thought that this amounted to a personal bequest to them, to be paid into their respective *proper hands*, and without a power of disposition, and that an absolute property was not intended to be given to them so as to impart such a power of disposition.

(*a*) 1 Ves. jun. 189. 3 Bro. C. C. 340, S. C. stated *infra*.
(*b*) 12 Ves. 501, stated *infra*. (*c*) 14 Ves. 302, stated *infra*.
(*d*) Stated 9 Ves. 594.

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The observations upon the last case are these; that the limitation was sufficient to vest separate estates in the sisters to which the law, without regard to any intention of the settlor, annexed the *jus disponendi.* There is nothing particular in the trust, it even wants the words "from time to time," and merely directs payment of the rents, &c. into the proper hands of the sisters. Such also were the trusts in *Clarke* v. *Pistor*, *Witts* v. *Dawkins*, and *Browne* v. *Like;* yet in those cases it was held that such a direction did not deprive the married women of their equitable rights of disposition. In truth the direction of payment into the hands of married women for their separate uses is the old method of making such a settlement, and to use *Lord Eldon*'s language in *Parkes* v. *White* (*a*), "these words are only an unfolding of all that is meant in a gift to the *separate* use" of the wife. And with respect to the settlor's intention, it has been before observed that mere *inference* of it is insufficient to take away the general power of married women to dispose of their separate property, but that express declaration to that effect is required. That such is the rule was admitted by *Lord Eldon* in the above case of *Jackson* v. *Hobhouse*, although its effect might be "to defeat the intention with which the power was given." Considering, then, this case to be in opposition to those preceding authorities, and even to the subsequent opinions of *Sir William Grant*, inferred from his decisions in the more modern cases of *Witts* v. *Dawkins*, *Browne* v. *Like*, and in *Sturgis* v. *Corp* (*b*), it is presumed that *Hovey* v. *Blakeman* is a case which would have been

(*a*) 11 Ves. 222. (*b*) *Supra*, p. 187.

differently decided had the question come before the same Judge with more solemnity.

RIGHTS OF WIFE'S GENERAL CREDITORS UPON HER SEPARATE ESTATE.

Such being the wife's power over her separate estate as a feme sole, and having before considered her authority to dispose of it without valuable consideration, we shall now proceed to examine,

II. The rights of the wife's *general* creditors upon her separate property.

Wife's general creditors have no valid claims upon her separate estate during her life.

In order to form a judgment upon these rights it is necessary to call to recollection the disabilities to which the wife is subject at law during the marriage. It has been observed (*a*), that by the common law restored by the case of *Marshal* v. *Rutton* (*b*), a married woman was not allowed, except in special cases, to contract as a feme sole, nor as such to sue or be sued. That being the legal rule, the wife cannot at law bind herself by any contract in regard to her separate property. In conformity with this doctrine of the wife's disability, Courts of Equity hold that her *general* personal engagements will not affect her separate property. So far these Courts act in analogy to the common law; and the rule of equity is that a married woman cannot by her general personal contracts bind her separate estate (*c*). To this extent Courts of Law and Equity act in concert. If, therefore, the wife contract debts generally without doing any act indicating an intention specifically to charge her separate estate with the payment of them, a Court of Equity will entertain no jurisdiction for an application of such estate in the hands of her trustees to such purposes during her life. This was so de-

(*a*) *Supra*, p. 120. (*b*) 8 Term Rep. 547. (*c*) 2 Dick. 562.

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cided by *Lord Rosslyn* in the case of *The Duke of Bolton* v. *Williams* (*a*).

In that case the wife granted annuities for value out of a rent-charge, being her separate estate. These grants were void from defects in the memorials, but the annuities were nevertheless claimed by the annuitants and resisted by the wife. The owner of the land charged with the rent, not knowing to whom to pay it, filed a bill of interpleader; and one point insisted upon by the annuitants was, that if the grants were defeated by such omission as before stated, still they were intitled to be repaid their purchase monies, with interest, out of the wife's separate estate. But it was determined against such title, because the specific charges having failed, the annuitants became *general* creditors only of the wife for the purchase money paid to her; and then, upon the principle that there was no equity for her general creditors upon which they could maintain a suit to enforce an appropriation of her separate property in the hands of her trustees for payment of their demands, the Court made such determination as above against the claims of the annuitants.

The remarks of *Lord Eldon* upon this case are these, "that it decided in the most direct terms, that where a married woman, having separate property, has sold an annuity charged upon it, and the grantee has not taken care to make the charge available (for it was his business to do so), the person, whose grant as such fails, would *not* have an *equity* specifically to affect the fund clothed with a trust for the separate use of the married woman with

(*a*) 2 Ves. jun. 138.

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the consideration; that *Lord Rosslyn* considered the case in two points of view, at law and in equity, and said, if the annuitants had an *action*, there was no occasion for equity to interfere; that if they had no action, there was no ground upon which a Court of Equity could interfere (*a*)."

The last case was acted upon by *Lord Eldon*, in that of *Jones* v. *Harris* (*b*), from which the above extract is taken.

It appeared that *A* was intitled to the rents of real estates to her separate use; out of which she granted an annuity to *B*, but the grant was *void* from the insufficiency of the memorial. Upon the bill of *B* for payment of the annuity out of the rents, the wife's separate estate, the same point was insisted upon as in the case of *The Duke of Bolton* v. *Williams*, viz. that as at law upon an implied *assumpsit* the grantee could recover in an action his purchase money, carrying the payments upon the annuity into account, so in equity *B*, being disappointed in the contract for the annuity, was intitled to be considered as *A*'s creditor, and although *B* had no lien upon the rents by virtue of the contract itself, still *A* having *separate* estate was to be considered in equity as debtor in respect of it, upon the ground of the *implied assumpsit*, and that the Court would consider *B*, if to be regarded as *A*'s *general* creditor, intitled to have the demand, due by virtue of that *assumpsit* (implied out of the failure of the contract), made good out of the rents and profits of *A*'s separate estate. But *Lord Eldon* dismissed the bill upon the principle stated in the case of *The Duke of Bolton* v.

(*a*) 9 Ves. 498. (*b*) Ibid, p. 486. See also 3 Mad. 94.

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Williams, and observed that there was great difficulty in raising the implied *assumpsit* to charge the separate estate, in opposition to the intention of both *A* and *B*, and to the authority of that case. *B* (said his Lordship) had no right to complain that the Court did not interfere upon such an application, merely to remedy negligence, and that if *B* had any complaint founded in moral justice, it was entirely *B*'s own fault in not taking care to obtain a perfect security.

Deductions from the two last cases.

These two cases have established the following propositions; that the wife's general creditors have no claim upon her separate estate, and that if she intend to incumber her separate property for money by a particular mode of conveyance, as by the grant of an annuity, which fails for want of a proper inrolment of the memorial, the creditor has no equity to resort to such estate upon any implication, nor upon the principle, that as the separate and disposable estate of the wife, it is liable to her debts, and consequently to this particular demand; for such estate is not liable to her general creditors (one of which is the annuitant in the present instance) and to except this claim would be contrary to the intention of the parties to the transaction, who only meant specifically to pledge the identical property, and not to make the wife personally answerable in respect of such transaction.

But after wife's death, bond and simple contract debts will be paid *pari passu,* in the distribution of her separate estate.

It appears from an *anonymous* case (*a*) next mentioned, that the proposition that the wife's general creditors have no claim upon her separate estate,

(*a*) 18 Ves. 258.

must be confined to the continuance of her life; for in that case a married woman having separate property, died indebted by bond and simple contract; and there having been a deficiency of assets to satisfy all her debts, the simple contract creditors insisted that those by specialty were not intitled to a preference, but that the distribution should be *pari passu;* and *Sir William Grant* said, that the circumstance of a debt contracted by a married woman being secured by bond, gave the creditor no priority; and that the bond, considered merely as a bond, being void (*a*), the consequence was that *all* the debts must be paid equally.

RIGHTS OF PURCHASERS AND CREDITORS TO WIFE'S SEPARATE ESTATE BY APPOINTMENTS, &c.

III. In the beginning of the last section it was noticed that Courts of Equity, in analogy to the rule at law, determine that a married woman cannot bind herself by general contracts; the consequence is, that she or her separate property are not affected by them. Her creditors have no legal remedy, since the law exempts her person, and she is allowed to take no interest apart from her husband; but in equity, although she be permitted to possess and enjoy separate estate as a feme sole, yet those courts, holding, in analogy to the legal doctrine, that a wife's general engagements are not binding, refuse to entertain jurisdiction at the instance of her general creditors, to subject her separate property in the hands of her trustees, to their demands. Courts of Equity, however, as a consequence of the principle established by them, that a married woman may take and enjoy property to her separate use, enable her to

(*a*) See *supra*, p. 128.

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deal with it as a feme sole. The right of disposition is an incident belonging to such interest and power; they therefore permit her to alien (*a*) or incumber her separate estate when she shows an *intention* so to dispose of it, but that intention is necessary to be manifested, as appears from the two cases last cited.

Having treated upon the rights of the wife's general creditors upon her separate estate in the preceding section, we shall next proceed to consider her dispositions of it by sales and grants, or by securities given for *particular* debts.

Supposing, then, the wife to be under no restriction from disposing of her separate property in anticipation, it follows, from what has been said upon the subject of her power to make *voluntary* dispositions of her separate estate, that she must also have the like authority to sell, or make grants out of, or otherwise to incumber it.

In arranging the several cases upon these subjects, it seems convenient to adopt the method which has been pursued in treating upon the *voluntary* dispositions by the wife of her separate estate.

1. When property is limited to the separate use of a married woman *generally*, without giving to her any particular power of disposition, she may sell, pledge, or incumber it in the same manner as if she were a feme sole.

Bonds of wife good dispositions *pro tanto* of her separate estate in equity.

Thus in *Biscoe* v. *Kennedy* (*b*), leasehold and other personal estate were on the marriage of *B* settled in trust for her separate use. She was indebted by bond at the time of her marriage, and her creditor filed a bill for payment of it out of her separate pro-

(*a*) *Supra*, p. 185. (*b*) 1 Bro. C. C. 17, in *notis*.

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perty; and *Sir Thomas Clarke* declared that *B*'s effects vested in her trustees were to be considered as the property of a feme sole, and ordered the debt and costs to be paid out of £500 *East India* stock, in the hands of her trustee.

The next case which I shall mention is *Hulme* v. *Tenant* (*a*). There, upon the marriage of *A*, her freehold and leasehold estates were settled in trust that the trustees should receive and pay the rents and profits of parts of them to the wife, for her *separate* use, and to convey the estates themselves to such uses as she by will, or by deed or writing under her hand and seal executed in the presence of two witnesses, should appoint; and in default of appointment, to the use of her heirs and assigns. The trustees were directed to sell the remainder of the estates, and out of the produce to invest £1000 according to *A*'s directions, and the interest and profits were directed to be paid to her, and the *principal* to her or to her order, by note or writing under her hand, and for want of appointment, to her executors, &c. *A* and her husband joined in a bond to *B*, and she afterwards borrowed of *B* a further sum, which, with the old debt, amounted to £180, for which *A* gave her own bond. *B* filed a bill for payment out of *A*'s separate estate, but the £1000 were out of the question, that sum having been wholly or nearly disposed of. The only point was, how far the rents of the estates unsold, and the estates themselves, were liable to *B*'s demand; and *Lord Thurlow* made no

(*a*) 1 Bro. C. C. 16. 2 Dick. 560, S. C. See also Pybus v. Smith, 1 Ves. jun. 189. 3 Bro. C. C. 340, S. C. and Dillon v. Grace, 2 Scho. and Lefroy, Ch. Rep. 456.

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decision upon the liability of the estates themselves, but declared and decreed that the *rents* of her real estates were liable to satisfy the debt.

This case has been repeatedly considered as a very strong determination, but the reason for such a conclusion does not appear. The decree merely affects the *rents* of the wife's separate estate, and they were limited to her *separate* use generally, and without any restriction as to her power of disposition. The wife's joining in the one bond, and giving *solely* the other, could alone be necessary with a view to her separate estate. She *intended*, therefore, to charge it; and although from the circumstance of her being a married woman the bond was void at law, still it was a good contract in equity. In this case, then, there being a *jus disponendi* without qualification, together with an intention to exercise it, and also a good equitable security, it is conceived that *Lord Thurlow* could not make any other decree than that which was pronounced by him; a decree which has been followed in subsequent cases (*a*), and had the authority of the Master of the Rolls in *Standford* v. *Marshall* (*b*), next stated.

In that case a father settled a real estate in trust for his daughters, with a direction that the rents should be paid to them, whether sole or covert, for their separate uses, either into their own hands, or the hands of any person that they should appoint. The daughters joined with their husbands in *bonds* for money advanced to the husbands, for the payment of which out of the rents, the obligees filed

(*a*) See Heatley v. Thomas, 15 Ves. 596, stated *supra*, p. 209.
(*b*) 2 Atk. 69.

their bill; and the Master of the Rolls decreed accordingly, upon the principle that the daughters having an absolute power over the rents, their bonds operated as good *liens* upon their interests.

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So also in *Wagstaff* v. *Smith* (*a*), £750 *four per cent.* Bank annuities were limited in trust "to permit *B* to take or receive the dividends to her own use for life, independent of her husband *C*, or any future husband." The husband and wife, in consideration of a sum of money paid to them by *D*, assigned the dividends to a trustee during *B*'s life, to secure the grant of an annuity to *D*, and the grant was established. Again,

As also are grants of annuities by her.

The case of *Power* v. *Bailey* (*b*), was to the like effect as the last. There, previously to the marriage of *A* with her first husband *B*, it was by articles of settlement agreed that her estates should be vested in trustees for her sole and separate use, and that she should have full power and dominion over them. *A*, prior to the marriage of *C*, (for whom she was under promise to provide) settled, with the privity of *B*, and in execution of her power, an annuity upon *C*, which *C* and her husband afterwards mortgaged. Payment of the annuity having been discontinued by the second husband of *A*, and a suit instituted by the mortgagee, *Lord Manners* determined that *A*'s separate estate was bound by the grant.

It will be noticed that the last case is an additional instance of the wife's power of disposition over her *real* estates during the marriage, when they were not conveyed to trustees, and the power rested

(*a*) 9 Ves. 521. (*b*) 1 Ball and Beat. 49. See also Parkes v. White, 11 Ves. 210, stated *infra*.

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merely in agreement between her and her husband before the coverture (*a*).

It is observable that the last cases are instances of the wife's power of selling and incumbering her separate property as incident to the nature of the interest which she took in it as a feme sole, to which may be added the cases of *Fettiplace* v. *Gorges*, and *Rich* v. *Cockell*, stated in a preceding page (*b*). These authorities, it is conceived, are sufficient to establish the proposition that the wife may dispose of, sell, or incumber, her separate estate, upon a pure limitation of it to her separate use. Notice must be here taken of *Mores* v. *Huish* (*c*), determined by the same judge who decided the case of *Whistler* v. *Newman* before stated (*d*); and it will be found upon examination, that the case of *Mores* v. *Huish* is not only in opposition to the cases before mentioned upon this subject, but also to those which have been determined upon the principle that a married woman is to be considered a feme sole to all intents and purposes in regard to her power of disposition of property limited to her separate use.

The case of *Mores* v. *Huish* considered.

Mores v. *Huish* was to this effect; the wife's freehold estates were vested in trustees, and settled in the following manner; Upon trust yearly to receive and pay the rents to her (*A*, the wife of *B*), as and when the same were received, or otherwise in their discretion to permit her and her assigns to receive them during her life, for her *sole and separate use*, notwithstanding her then present, or any future coverture. Her receipt was declared to be a suf-

(*a*) See *supra*, p. 180. (*b*) *Supra*, p. 186. (*c*) 5 Ves. 692.
(*d*) *Supra*, p. 188.

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ficient discharge for the rents, and that they should not be liable to the debts, &c. of her then or any future husband, but *be solely at her disposal.* The trustees after *A*'s death were to pay the rents to *B* for life, and upon his decease to convey the estates to the children in tail general, and in default of issue, to the survivor of *A* and *B* in fee. *A* and *B* granted an annuity to *C*, secured upon the estates; but before the deeds were executed, the surviving trustee gave notice to the annuitant, that he *would not consent* to any mortgage or alienation, and informed him of the extravagance of *B*, the husband, who could give no security. Notwithstanding this caution the purchase of the annuity was completed. A bill was filed by *C*, to subject the rents of the wife's separate estate to the payment of the annuity. But *Lord Rosslyn* dismissed the bill, with costs: first, because he doubted the power of a married woman to give such a security; secondly, because she had no power of appointment given to her; and thirdly, because the trust was that the trustees were to receive the rents and pay them from time to time to the wife's separate use; and fourthly, because *C* had notice from the surviving trustee not to complete the purchase.

To the first and second reasons it may be answered (as it has been before proved (*a*)), that the wife has absolute dominion over her separate property, and without the authority of a special power to dispose of it as she pleases. Under this the wife's general power to alien her separate estate, the cases stated in the beginning of this section were decided. To

(*a*) *Supra*, p. 184, et seq.

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the third reason it may be replied that the words "from time to time" did not occur in this case, but that if they had occurred, or if the words used, viz. "as and when received," be of the same import, their insufficiency to restrain the wife's general power of disposition incident to her having separate property, has been before shown, and will further appear from the cases after stated in this section. And with respect to any difference being made by the trust being express, that the trustees should receive and pay the rents to the wife, it cannot be contended with any degree of plausibility that it amounts to more than a mode to give the property to her separate use and disposal. *Hulme* v. *Tenant* (*a*) was a trust of this kind, and yet *Lord Thurlow*, after great consideration, held that such trust, did not preclude the wife's power as a feme sole to alien her separate interest. And in *Parkes* v. *White* (*b*), *Lord Eldon* considered a trust like the present to mean no more than a gift to the wife's separate use. In answer to the fourth reason assigned by *Lord Rosslyn*, I shall state the case of *Essex* v. *Atkins* (*c*), which is also an additional instance of the grant of an annuity by a married woman out of her separate estate being supported.

Although the annuities be granted contrary to consent of wife's trustees, of which the annuitants had notice, such grants will be good.

The object of the bill was to establish the grant of an annuity out of £3000 5 per cent. Bank annuities bequeathed to *A* before her marriage with *B*, which were not to be subject to the debts, control, or engagements of any after-taken husband. The wife insisted by her answer that she did not voluntarily consent to the transaction, but that her concurrence

(*a*) *Supra*, p. 247. (*b*) *Supra*, p. 238. (*c*) 14 Ves. 542.

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was obtained by duress. Evidence was produce on the part of the annuitant, that the business was explained to the wife, and that she was anxious that it should proceed; that the deed was read to her, and that she appeared satisfied. It was also proved that one of the executors or trustees informed the annuitant before the transaction was completed, that he and his co-executors would not pay any of the dividends except to *A*, and that he also stated to the annuitant complaints made by the wife of her husband's ill-treatment in consequence of her refusal to join him in raising money; the executor also produced the will. Under these circumstances the question was, whether the Court would enforce payment of this annuity out of the wife's separate estate? And *Sir William Grant* said that the only doubt which he had in the case arose out of *Lord Rosslyn*'s judgment in *Mores* v. *Huish*, in which case the bill of a purchaser of an annuity was dismissed upon the ground that he had *notice* from the trustee of the wife that it was a very bad and improvident bargain, and that he never would consent to it: that in this case (*Essex* v. *Atkins*) the purchaser was cautioned against making the purchase by the trustee, upon the ground that the married woman had expressed great reluctance to pledge or part with her separate property for the accommodation of her husband, and that if he did purchase, they never would pay; therefore, according to *Lord Rosslyn*'s opinion in *Mores* v. *Huish*, the Court *ought not to interpose* under such circumstances, for the purpose of giving effect to the purchase. After thus comparing the two cases, his Honor observed, in opposition to *Lord Rosslyn*'s opinion, that it was only in equity that the

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contract of a married woman with regard to her separate property could be inforced; the Court, therefore, must of necessity decide upon its validity, and could not leave the purchaser to a legal remedy, because he had none; so that not to act was the same thing in effect as setting aside the contract; and his Honor added, that he did not know how he could say that the annuitant ought to have no remedy of any kind, except upon the ground that there was no valid contract. The Master of the Rolls then in allusion to the opinions of *Lords Thurlow* and *Rosslyn* observed, that in *some* cases *Lord Thurlow* acted with *extreme reluctance* for the purpose of giving effect to the improvident engagements which the wife had entered into; yet he did not *think* himself at liberty to say that the Court would not at all interpose where the subject was entirely of equitable jurisdiction. Upon the effect of the assent or dissent of trustees upon the wife's power of disposing of her separate property his Honor remarked, that if the transaction could not upon its own merits be impeached, he did not see how any declaration by the trustee in this case could render it null and void.

Of the necessity of wife's trustees consenting to the disposal of her separate estate.

The established doctrine was (notwithstanding *Lord Rosslyn*'s doubt), that a married woman can bind her separate property without the trustees, unless their assent is rendered necessary by the instrument giving her that property (*a*). Their *dissent*, therefore, could not have any effect where their *assent* was unnecessary, and their declaration that she was unwilling could not be evidence of the fact that she

(*a*) *Supra*, p. 221.

parted with her property by coercion. Upon the whole his Honor concluded, that if upon the evidence the wife was a free agent, and understood what she did, the Court had no choice, but must give effect to her contract; that the evidence proved her consent, and there was nothing in it which would have authorised the Court to set aside the agreement if she had filed a bill for the purpose. The contract was therefore enforced.

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This case, and the principle upon which it was decided, a principle that has been repeatedly acknowledged and acted upon both before and since *Mores* v. *Huish*, have taken away all authority from such case and from that of *Whistler* v. *Newman* before stated (*a*).

2. The cases which have been considered were upon limitations of property to the wife's separate use *generally*, and without any special power of disposition given or reserved to her; and it has been before noticed (*b*), that when the wife takes only a partial interest, as for life, with a power to appoint the capital, she must *duly* execute such power, in order to pass the absolute interest in the fund to a *volunteer*. But this is not so when the appointees are purchasers, incumbrancers, or creditors; for, since Courts of Equity supply defective executions of powers in favour of such persons, if the wife, for a *valuable* consideration, purport to execute her power, and it should prove defective, the appointee will be intitled to have such defect supplied in a

Equities of purchasers and creditors on wife's separate estate claiming under appointments made in virtue of special powers.

If the powers be defectively executed, so as to be bad at law, such defects will be supplied in equity.

(*a*) *Supra*, p. 188. And see Allen v. Papworth, 1 Ves. sen. 163.
(*b*) *Supra*, p. 211.

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Court of Equity (*a*). Accordingly, in *Chapman* v. *Gibson* (*b*), the Master of the Rolls said, he thought that the jurisdiction of a Court of Equity in supplying defects in the execution of powers and the surrenders of copyhold estates was founded upon one and the same principle.

But the powers must by some acts have been intended to be executed.

But although defective executions of powers will be remedied in favour of purchasers and creditors, the Court cannot interfere if the powers be not *attempted* to be executed (*c*). The intention to execute them must be apparent; for, unless that were so, if a Court of Equity should nevertheless assume jurisdiction, it would exercise powers of appointment, instead of supplying defects in the executions of them.

And the defects must not be such as to destroy the deeds.

The defects to be supplied must be understood to be such which do not destroy the instrument of appointment itself; for we have seen, that if a married woman charge her separate estate with an annuity, and the deed granting it become void, from a proper memorial of the deed not having been inrolled, the annuitant has no relief in equity (*d*).

When necessary for a Court of Equity to supply defects in the execution of powers.

Upon the interference of a Court of Equity to remedy the defective executions of powers for creditors and purchasers, the following conclusions may be drawn from the contents of this and the last chapter, attending to the distinctions;—first, when

(*a*) Cowp. 267. Sergeson v. Sealey, 2 Atk. 412, 415, stated *supra*, p. 225. Tollet v. Tollet, 2 P. Will. 490. Hervey v. Hervey, 1 Atk. 563. Cotter v. Layer, 2 P. Will. 628. (*b*) 3 Bro. C. C. 231. (*c*) Bull v. Vardy, 1 Ves. jun. 270. See also 2 Vern. 69. 1 Bro. C. C. 21. 17 Ves. 388, 460, 462. (*d*) *Supra*, p. 242.

the wife has a mere power to appoint the capital; secondly, where she has neither power over nor interest in the capital, except the annual produce limited to her separate use for life, with a particular power to dispose of such produce, not amounting to a prohibition to alien it by anticipation; and, thirdly, when the wife takes an absolute interest in the fund, accompanied with certain powers or qualifications for the disposal of it, merely prescribed in consequence of the wife's condition as a married woman. In the first case it is necessary for the wife to make an appointment of the principal fund either to a creditor or purchaser; in which event, if the appointment be defective, a Court of Equity will remedy the error. But in the second and third cases, since special appointments under the particular powers are unnecessary, there is no occasion for a Court of Equity to supply any deficiencies in them; for it is presumed, that if the wife by deed or will purport to dispose of or incumber her separate estate, the disposition will take effect out of her separate interest, if it cannot do so under a due execution of her power. It is upon this principle that the cases have proceeded, in paying little attention to the forms or requisites of the instruments of appointment in relation to the powers under which they were made, when it was settled that the wife took the property in the character of a feme sole. This has been shown from the cases already mentioned, and it will further appear from those next stated, in which, although special powers of disposition were added to limitations to the separate uses of married women, the alienations and charges of their separate estates were supported in equity

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under the general *jus disponendi* belonging to such interests, and not as due executions of the special powers also given for those purposes; and they are instances of what has been before noticed, viz. that a direction for payment to the wife of her separate annual income "into her own proper hands," or "from time to time," will not abridge or destroy her general power of disposition by anticipation.

Thus, in *Pybus* v. *Smith* (*a*), a settlement was made upon the wife under the directions of the Court of Chancery, by which her real and personal estates were vested in trustees, upon trust as to the real to permit *A* the wife to receive the rents for life, or to pay them to such persons, &c. as *A* by deed or writing under her hand, with or without power of revocation, "from time to time" should appoint, and in default of appointment to her sole and separate use for life, and after her death, if no children (which was the case), to such persons, &c. chargeable with such sums, &c. as *A*, whether covert or sole, should, by any deed or writing under her hand and seal to be by her duly executed in the presence of two or more witnesses, appoint, and in default of appointment in trust for her absolutely. The personal fund was limited in the like manner, except that in her power of appointment the words "from time to time" were omitted; and the ultimate limitation of it was to her executors and administrators. In the year 1785 *A* by deed, executing her power, appointed the then and *future* rents of her real estates during her life, and the estates themselves after her

(*a*) 1 Ves. jun. 189. 3 Bro. C. C. 340, S. C.

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death, also the then and *future* interest of her personal estate, and the capital after her death, if she left no issue, in favour of *B* and *C*, as a security for the debt of her husband *D*. *A* by a subsequent deed in the same year appointed the rents and interest of her real and personal estates to *D* her husband during her life, and also the estates after her death, without leaving issue, to her husband absolutely. *D* by a deed in 1786 made a further security of the premises to *B* and *C*. And upon the bill of *B* and *C* to have the benefit of these securities against the separate estate of *A*, *Lord Thurlow* directed the Master to inquire under what circumstances the two first deeds were obtained and how executed; his Lordship observing, "it was very fit, in the case of a married woman, that the Court should know how she had disposed of her property, and that these cases had not been sufficiently attended to (*a*)." The Master having reported that the deeds were fairly entered into and properly executed by *A*, his Lordship decreed in favour of the claim of *B* and *C*, upon the right of a married woman to act as a feme sole in relation to her separate property, holding that the direction of payment "from time to time" did not alter such right.

So, also, in *Witts* v. *Dawkins* (*b*) the trust was, that the trustees should pay the rents of the premises to such person or persons *only*, and for such purposes *only*, as *B* the wife should by any writing or writings to be signed with her hand from "time to time" notwithstanding coverture direct or ap-

(*a*) See p. 229. (*b*) 12 Ves. 501.

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point, and in default, and in the mean time, and from *time to time until* she made such appointment, the trustees should pay the rents into her *proper hands* for her sole and separate use, exclusive and without the intermeddling of her husband, and to whose debts or control the same were not to be liable, and *B*'s receipts were to be good discharges. *B* agreed to sell to *C* the rents, and upon his bill for a specific performance of the contract it was so decreed.

In *Browne* v. *Like* (*a*) the trust was to permit *A* during the life of *B* her husband to receive the residue of dividends upon certain stock, and the whole of them after *B*'s death, for her sole and separate use for life, and to pay the same "into her own proper hands" for her own separate use and benefit, and that her receipts "from time to time" should be good discharges, and that no part of the dividends should be subject to her husband's debts. *A* and her husband concurred in a sale of £20 a year, part of the dividends, to *C*, upon whose bill *Sir William Grant* decreed in affirmance of the sale.

Upon the principle of the wife's right to dispose of her separate interest for life, under the general power which the law gives her as incident to that estate, without regard to the particular power or directions prescribed for the purpose by the settlor, the case of *Bullpin* v. *Clarke* (*b*) was decided.

In that case, upon the marriage of *A* with her husband *B*, several of her real estates were settled upon trust, that the trustees should receive the rents

(*a*) 14 Ves. 302. (*b*) 17 Ves. 365.

and pay them to such person or persons, &c. as *A* at any time during her life notwithstanding coverture should appoint, and in default of appointment to pay them into "her proper hands" for her sole and separate use. Her personal estate was also vested in the same trustees for her sole and separate use, and to be applied as she should direct. *A* borrowed £250 upon her promissory *note* from *C*, who instituted the present suit to obtain payment of the debt out of *A*'s separate property. And *Sir William Grant* decreed that the principal, interest, and costs should be paid by the trustees out of the rents and profits of the estates.

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IV. Having considered in the preceding pages the wife's power of disposition of her separate estate in favour of volunteers, purchasers, and creditors, I shall proceed in this section to show,—

When the wife will and will not be intitled to relief in equity against such dispositions of her separate property in favour of creditors or purchasers.

It has been before shown that a married woman is to be considered a feme sole in relation to her separate estate, and that she has power as such to give away or otherwise dispose of it. It follows from this proposition, that her equity for relief against gifts or dispositions of her separate property must be the same as that which is sufficient to defeat similar acts amongst persons in general; such as fraud, surprise, undue influence, &c.

In *Grigby* v. *Cox* (*a*) it was holden, that the wife's concurrence *with* her husband in a sale of her sepa-

Instances of wife not being relieved against her separate contracts.

(*a*) 1 Ves. sen. 517. See also Essex v. Atkins, 14 Ves. 542, stated *supra*, p. 252.

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rate estate, and without the joining of her trustees, could not be impeached, there being no evidence of imposition or undue influence. The principle was, that the wife might have appointed the property to her husband, and therefore that his being a party with her in a sale to a stranger could not vitiate the transaction. In that case the husband covenanted that the estate was free from incumbrances; and *Lord Hardwicke* said that such circumstance made no difference, since the demand of such a covenant from him was but a reasonable request and precaution against a prior secret appointment of the wife, and that the husband alone was the person answerable for a breach of it.

So also in *Masters* v. *Fuller* (*a*), *A* (the wife of *B*, who had agreed to take a house of *C* at the rent of £20), having separate property, entered into an agreement *without her husband's knowledge*, to pay *C* an *additional* rent of £18 for the house, in consideration of its being differently fitted up, and which she paid up to her death. *A* appointed her husband *B* executor of her will, who filed his bill to be relieved against this agreement of *A*, charging it to have been a fraud upon *A*, and obtained by improper means, but which *C* denied in his answer, and stated that the house was fitted up by *A*'s direction, and according to her fancy, and that both rents formed but a moderate rent in the whole for it. The counsel for *B* contended that the agreement being concealed from *B* was a fraud upon him as *A*'s husband, and also upon him as standing in

(*a*) 4 Bro. C. C. 19.

A's place, who would have been relieved against the contract if she had been living. But the Lords Commissioners of the Great Seal thinking otherwise dismissed the bill, without hearing *C*'s defence.

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The two following cases seem to establish (notwithstanding the suspicion which attaches to purchases by trustees from their cestuique trusts (*a*)), that if the wife sell her separate estate to her trustee, and the transaction be *bonâ fide* and for a proper consideration, the disposition will be valid.

Sales by wife to her trustee, when valid.

Thus, in *Davison* v. *Gardner* (*b*), the wife being intitled to a brewhouse to her separate use, vested in a trustee for her, sold it to him for its full value, and no fraud appeared in the transaction. To set aside this sale the wife filed her bill, but it was dismissed by *Lord Hardwicke*.

In *Parkes* v. *White* (*c*), the real estates of *Mr. Parkes* were limited by settlement to *White* and his heirs to the use of *Mrs. Parkes* for life, and to preserve contingent remainders in the usual manner, but in trust, to permit her to receive the rents for her separate use for life, remainder to such persons, &c. as she, notwithstanding her coverture, by *will*, or any writing purporting to be her will, should appoint; and in default of appointment, to the use of an only child, absolutely, but if more than one, in trust to sell the premises, and divide the proceeds amongst them, as therein mentioned, with the ultimate limitation, if no issue, to her right heirs. By deeds in *May* 1779, *Mrs. Parkes* and her trustee

(*a*) Coles v. Trecothick, 9 Ves. 234. Randall v. Errington, 10 Ves. 423. (*b*) Stated in Sugd. Vend. and Purch. 4 Ed. 485, 486. (*c*) 11 Ves. 209.

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mortgaged her life estate to *A* for a debt of her husband; and by other deeds in *May* 1785, reciting untruly that she and her husband were intitled to *sell* the trust estate, *White* and the legal personal representative of *A*, the mortgagee, in consideration of the discharge of the mortgage and of £800 paid to *Mrs. Parkes* and her husband (in the whole £1000) and at their request and by their direction (who agreed to levy a fine, which was afterwards levied) conveyed to *Evans*, the heir of *A*, the premises in fee. *Mrs. Parkes*, in order to complete the title of *Evans* under her *power*, made a *will*, appointing him executor, and devised to him the inheritance of the estate; and for the purpose of preventing any revocation of such will and a new appointment, the husband gave to *Evans* a bond with a condition to that effect. In *August* 1785, *White*, the trustee, bought the premises of *Evans* for £1000; and in 1793 he sold them to *Quarman* for £1500, to whom he gave a bond of indemnity against *Mrs. Parkes* and her husband. In April 1799 *Mr.* and *Mrs. Parkes* executed another instrument, by which after acknowledging their receipt from *White*, the trustee, of £200, stated by him to be the difference of price between *Evans*'s purchase in 1785 and that of *Quarman* in 1793, after deductions, &c. and that *Mrs. Parkes* had made a will in favour of *Quarman*, they engaged that she should not execute another will, nor do any act to molest *Quarman*, his heirs, &c. At the time of *White*'s purchase the net rent of the estate was £50. *Mrs. Parkes* endeavoured to set aside these transactions upon the grounds of her not having received a valuable consideration, and of her being under the control and influence of her husband and

White; her bill charging that *White* had attempted to make undue advantages by taking a conveyance of the trust estate from her; and that *Quarman* had notice of the settlement, and took a bond of indemnity from *White*, which notice and bond he admitted in his answer, but claimed the benefit of the purchase as made without fraud, or at least to be allowed the *rents* received on account of his purchase money and interest, and to stand as a mortgagee for the residue to the full amount of the principal and interest of all monies *White*, the trustee, might have advanced for the use or by the direction of the wife. The objects of the suit were, first to subject the legal estate in the settled property in *Quarman* to the settlement uses, at least subsequent to the trust for the wife's separate use; and secondly for a declaration as to her interest (notwithstanding her acts and the remote periods when they were done) that *White* and *Quarman* were *trustees* of the rents during the whole time for her separate use. But as to the wife's *separate* trust estate for life, let in by levying the fine, *Lord Eldon* decreed that *Quarman* was intitled to it on the principle of the wife's right to dispose of it as a feme sole; and that *White* being a mere trustee to preserve contingent remainders, and to pay the rents to the wife's separate use, was not such a trustee to whom the doctrine of the Court, in regard to trustees buying trust property, applied (*a*). But that as to the limitations in the settlement to the general appointment of the wife after her death by *will*, and in default of any to her children, his Lordship held, that they were not affected by the trans-

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(*a*) 11 Ves. 226.

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actions, since *White* being a *trustee* to protect the ambulatory appointment of the wife and the interests of her children, the transactions could not be supported in breach of those duties, and from what appeared on the face of the instruments (*a*). The wills, therefore, were ordered to be delivered up; and *Quarman* was directed to convey the premises to new trustees to *his own use,* during the wife's life, with remainder upon the trusts of the settlement, except as to the ultimate reversion, which was to be limited to himself in fee. This ultimate reversion the reader will have observed belonged to the wife; and it is presumed that it was excepted in favour of *Quarman* from the effect of the fine which was levied.

Circumstances under which wife's dealing with her trustee concerning her separate estate was set aside.

I shall now advert to a case where a creditor of the husband procured himself to be appointed a trustee of the wife's separate estate, and then prevailed with her to execute a deed providing for payment of the interest and principal of the debt out of her separate property vested in him as her trustee, under which circumstances the Court set aside the transaction.

The case alluded to is *Dalbiac* v. *Dalbiac* (*b*). There £65 long annuities, the separate estate of *A*, the wife of *B*, were vested in the executors of her surviving trustee. In *May* 1796, *B* and his uncle *D* procured *A* to join with him, *B*, in a bond to *D*, for *B*'s debt. The executors refused to pay the interest out of *A*'s estate, and *D*, the creditor, and *E* were appointed new trustees under a decree obtained for the purpose, and the annuities were transferred into their names. Immediately after this transfer

(*a*) 11 Ves. 231. 235. (*b*) 16 Ves. 116.

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D, without consulting *E*, his co-trustee, prevailed upon *A* to execute a deed, declaring that the new trustees should be possessed of the annuities upon trust to apply them in payment of the interest of the debt, from *March* preceding the date of the bond, and the surplus to *A* for life, and after her death to discharge the principal out of the capital fund, which was limited to the wife absolutely in the event of her leaving no child. *B* the husband being dead, *A* filed a bill to be relieved against the above securities, and for a transfer of the annuities to herself, there being no child; also for payment of the amount of *D*'s receipts since he became a trustee. *D* insisted upon the fairness of the transaction, but acknowledged that his consent to become a trustee was with the design of repaying to himself his debt more readily out of *A*'s separate estate. *E* the co-trustee did not sign the deed. *Sir William Grant* decreed the securities to be delivered up, because *D* imposed upon the Court in *suppressing* his debt for the purpose of being appointed a trustee in order to obtain dominion over the fund, and with it to pay his own debt; that *D*, therefore, was precluded from setting up such demand against *A*, and could not be allowed the benefit of the deed obtained under the above circumstances. With respect to *D*'s receipts, his Honor decreed that an account could not be taken farther back than from the husband's death, as he and his wife lived together; and that since she, during his life, would not be intitled to an account against his representative, she was equally precluded against his creditor and assignee (*a*).

(*a*) See *ante*, p. 226, *et seq.*

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If, however, the wife with full knowledge of her rights acquiesce for a length of time in dispositions of her separate property, against which she might originally have obtained redress, the Court will not relieve her (*a*). This appears from *Lord Hardwicke's* clear and elaborate judgment in *Pawlet* v. *Delaval* (*b*); in which case his Lordship decided that *Lady Pawlet* was concluded by her acts and acquiescence in constituting her separate estate part of the assets of *Lord Pawlet*, her first husband; and he emphatically observed, that facts and acquiescence were material to determine great rights and properties.

Effect of wife's acquiescence.

V. Having considered in prior parts of this treatise various subjects branching out of the now established doctrine, that a married woman is to be treated as a feme sole in relation to property settled to her separate use, what remains to be discussed in the present chapter will only regard her capacity of suing and being impleaded as a single woman in respect of such estate; her character as a married woman living apart from her husband by mutual agreement, upon a separate maintenance, being reserved for consideration in the next chapter.

It is firmly settled that a married woman cannot bind her person by any contract during the coverture (*c*), except under the special circumstances beforementioned (*d*). At law, therefore, she cannot sue or be sued without her husband being a party as before observed (*e*); and so it is in equity, this

Wife's separate cha-

(*a*) Campbell v. Walker, 5 Ves. 678. (*b*) 2 Ves. sen. 668; on this subject, see *supra*, p. 226. (*c*) *Supra*, p. 120. (*d*) *Supra*, p. 123. 126. (*e*) Marshal v. Rutton, 8 Term Rep. 547.

distinction being observed, that when her suit is for her separate property, her husband should be made a defendant, and she alone be the complainant under the protection of her next friend (*a*); but when she is a defendant in that Court, the suit being to establish a claim upon her separate estate, she is so far considered as a single woman, as to make it necessary to serve her personally with process in the cause (*b*).

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Since the wife is liable only to the extent of her separate property in the hands of her trustees, a Court of Equity merely operates upon it and not against her personally (*c*); but as she is clothed with the character of a feme sole in regard to such estate, and her husband is a mere formal party, and the Court cannot pronounce a decree to bind her separate property without her answer, &c. so that injustice might result from allowing her an exemption from the process of contempt, it has been determined that she is personally answerable for contempts in not obeying the orders of the Court, and may be committed to prison as any other person.

racter in equity in regard to proceedings by or against her.

Liable to answer personally for contempts of Court.

Thus in *Bell* v. *Hyde* (*d*), and *Dubois* v. *Hole* (*e*), the wife was committed to prison for not putting in an answer; and in *Stansbury* v. *Watkins*, a case at the Rolls in the year 1772 (*f*), *Sir Thomas Sewell* ordered an attachment to issue against the wife *alone*.

But in *Carleton* v. *M'Enzie* (*g*), a wife executrix

But an order must be first

(*a*) Griffith v. Hood, 2 Ves. sen. 452. (*b*) 9 Ves. 488. (*c*) 1 Bro. C. C. 20. (*d*) Pre. Ch. 330. (*e*) 2 Vern. 614. Ed. by Raithby. (*f*) Stated in notes, 2 Vern. 614. (*g*) 10 Ves. 442.

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and residuary legatee answered the original bill jointly with her husband, the bill was amended, and her husband went abroad; and *Lord Eldon* determined that in such a case, a previous order that the wife should answer separately was necessary to bring her into contempt for not answering the amended bill.

obtained for her separate answer.

CHAPTER XXII.

ON SEPARATION BETWEEN HUSBAND AND WIFE.

HAVING discussed in former parts of this work the rights of husband and wife in each other's property whilst living together, their power over it, and the wife's interest as a feme sole in real and personal estates limited to her separate use, we shall lastly consider the law and equity resulting from a suspension of the marriage state by voluntary separation of husband and wife.

This kind of separation is the offspring of late years, and totally unknown to the common law; and the observation must be repeated that, as in the other innovations upon that law, so in this instance the legal acknowledgment of this species of divorce has introduced in the administration of justice considerable difficulties and perplexities (*a*). According to the original policy of this country the Ecclesiastical Courts had exclusive jurisdiction of the rights and duties arising from the state of marriage, and they acknowledged no such kind of divorce as that under consideration. They did not permit the parties by voluntary compact to alter those rights and duties, and in so doing they prevented those anomalous cases which have occurred since the establishment of

(*a*) 11 Ves. 529.

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the doctrine in Courts of Law and Equity, that a separation *in pais* is in effect valid, and that whilst it continues the wife is to be considered in most respects a feme sole. In consequence of this departure from the common law, and the inconsistencies between the rights and powers belonging to those two different conditions of life, originate the difficulties in dispensing justice when a married woman is permitted to assume the character of a feme sole; for a married woman is, as we have seen, disabled by policy of the common law from contracting so as to bind her person; neither can she be guilty of felony in the presence of her husband, nor can sue or be impleaded without him (*a*); she is also debarred from being a witness for or against him; so that if she were made a defendant to a bill praying no relief against her but merely seeking a discovery, which if admissible in evidence, would affect her husband, a demurrer would hold to such a proceeding (*b*).

Demurrer good to a bill seeking discovery from wife to affect her husband.

I shall consider the subject of this chapter under the following heads:—

I. *The* legal *effect of a separation* in pais *when the property of husband or wife is by deed vested in trustees to pay the wife a yearly sum for maintenance, distinguishing when such deed is made with a view to a* future *separation, and when with a view to an* immediate *one.*

II. *The validity of deeds of separation against the husband's creditors.*

(*a*) *Supra,* p. 128. (*b*) Le Texier v. the Margrave of Anspach, 5 Ves. 322. 15 Ves. 159.

III. *The jurisdiction of a Court of Equity in decreeing the performance of agreements for separation and for separate maintenance.*

IV. *The wife's power of alienation over her separate maintenance, its liability to her debts, and the husband's responsibility for her debts contracted during separation.*

V. *What will determine the wife's separate provision, and her remedy when molested by her husband whilst separated from him.*

VI. *The effect of separation upon the husband's right of action for his wife's adultery during the period of their living apart.*

Deeds made in contemplation of *immediate* separation good at law.

I. Every person who reads the cases on the present subject must be forcibly struck with the difficulties which have arisen from the proposition once established, that husband and wife have the power, with or without cause, to effect a legal and binding separation through the intervention of trustees, by mutual agreement *in pais* to live apart. This, however, is established by a series of decisions, whatever may be the anomalies and perplexities which attend it. The principle has been acknowledged and acted upon in a number of instances (*a*). If, then, deeds of settlement made in contemplation of *immediate* separation be not illegal, and the provisions for the wife's maintenance may be enforced, it does not appear why a similar provision made with a view to an event which may

(*a*) 8 Term Rep. 521. 2 Ventr. 217. Leech v. Beer, 3 Keb. 363. 2 Bro. C. C. 90. 3 Meriv. 256.

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occur, viz. the necessity of a separation at some future period during the marriage, should be more illegal or contrary to policy; for the same arguments of illegality and bad policy apply to each case, as also to all separate provisions made for married women, by rendering them independent of their husbands, and facilitating a separation between them, yet those latter provisions are valid. Such is the reasoning of *Le Blanc*, J., in the case of *Rodney* v. *Chambers* (*a*). The perplexities occasioned by the present law of separation are detailed in *Lord Eldon*'s judgment in the case of *Lord St. John* v. *Lady St. John* (*b*); but the root of the evil lies in the allowance of any separation between husband and wife, except under the authority of the Ecclesiastical Court, which permits no divorce a *mensâ et thoro* except *propter sævitiam aut adulterium*, for whilst this separation *in pais* is allowed to continue, and the wife is to be considered as a feme sole during her voluntary residence apart from her husband, difficulties must occur in applying the same rules of law to her, still clothed with the character of a wife, as are applicable to single women.

And although it has been decided that such deeds are equally valid when made with a view to a future separation taking place with the approbation of trustees,

In accordance with the above observations the Court of King's Bench decided in *Rodney* v. *Chambers* (*c*), that the husband's covenant with his wife's trustees to pay her an annuity as separate maintenance in the event of a separation *in future* taking place between them, with the *approbation of the trustees*, was a legal and valid covenant; and the

(*a*) 2 East, 297. (*b*) 11 Ves. jun. 529. (*c*) 2 East, 283.

Judges were unanimously of opinion, that the trustees were intitled to recover in an action against the husband the arrears which had accrued on the annuity after separation. That such a covenant was binding seems to have been tacitly admitted by the Court of Common Pleas in the case of *Gawden* v. *Draper* (*a*), which was considered in the last case; and the validity of the like covenant does not appear to have been doubted in *Chambers* v. *Caulfield* (*b*), for there the deed made provision for the event of a future separation, and the husband covenanted, "that in case of future differences, and his wife should at any time thereafter find it necessary to live separate and apart from him, he would permit and suffer her to leave him, &c. *provided* the separation took place with the *approbation of the trustees* or of the survivor." And *Lord Ellenborough*, C. J., in thoroughly canvassing that instrument, instead of doubting its validity, seems to have considered it as good and binding. Upon *Rodney* v. *Chambers* being referred to in the argument, *Lawrence*, J., thus expressed himself, "in that case there was an averment that the separation was with the consent of the trustees. We thought that there was nothing illegal in the parties agreeing to refer the question, what was a good cause of separation, to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce and alimony. The Court, therefore, only decided in that case that a covenant for separation and separate maintenance with the consent of the trustees was good; *not* that

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(*a*) 2 Ventr. 217. (*b*) 6 East, 244.

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a covenant was good *generally* that a wife might separate herself from her husband whenever she pleased, for that would be to make the husband tenant at will to the wife of his marital rights."

Hence we have the principle upon which *Rodney* v. *Chambers* was decided, declared by one of the persons who sat in judgment in it, and who continued of the same opinion as he entertained when that case was determined.

In addition to the above authorities may be adduced a case, finally decided upon this subject by the highest authority in *Ireland*, to show how such covenants as the present were considered by the House of Lords in that country before the Union.

The case was *Hoare* v. *Hoare* (*a*). There the wife was intitled for life to two annuities amounting to £400, which *before* her marriage were vested in trustees, upon trust that if a separation should afterwards take place between her and her future husband at her instance, the trustees should permit her to take to her separate use a *moiety* of the annuities of £400 during such separation, and should permit her husband to receive the other moiety; but that if a separation took place by his means, or at his instance, then that she should receive the *whole* of the £400 annuities for her separate use during the marriage. It seems that a separation took place in consequence of the cruelty and misconduct of the husband; and a bill was filed by the wife in the Court of Chancery in Ireland to enjoin the husband from

(*a*) 2 Ridgeway's Parl. Ca. in Ireland, 268.

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intermeddling with the annuities, and to restrain the trustees from paying any part of them to him; and praying that the trustees might pay the *whole* of the annuities to the wife under the above provision in the settlement, and for a receiver. The husband stated in his answer, that he had always used his wife with tenderness and affection, and he offered to take her back and to treat her as his wife. Upon the evidence and the pleadings the Court ordered a *moiety* of the annuities to be paid to her until cohabitation or further order, to commence from the time of the separation. The wife being dissatisfied with this decree appealed from it to the then House of Lords in that country, claiming the whole of the annuities under the above settlement. All objections as to the jurisdiction of the Ecclesiastical Court, and in relation to the immorality and illegality of the agreement, were urged, and moreover that it was an agreement for a divorce instead of a marriage; and it was further contended that the husband having judicially offered to take his wife back again, had determined the separation. But the House of Lords were not moved by these arguments. It varied the decree, and ordered the *whole* of the annuities to be paid to the wife until she and her husband should cohabit, or till the further order of the Court below.

It may be inferred from *Lord Hardwicke*'s judgment, in *Moore* v. *Moore* (*a*), that he considered such an agreement *in prospectu* to be valid; and a like inference may be drawn from *Lord Vane*'s

(*a*) 1 Atk. 277, stated *supra*, p. 135.

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case (*a*), in which, a separation having taken place, the husband and wife agreed to cohabit; and by articles entered into on *that* occasion, he covenanted, that if she desired to live apart he would not molest her. After these articles were concluded, cohabitation took place, but in consequence of ill treatment, the husband and wife separated a second time, and she having exhibited articles of the peace against him, the Court considered, that under the circumstances, and the agreement providing such future possible separation as above (the validity of which was not questioned), the wife was intitled to security.

Yet *semble*, that such deeds would not now be supported.

Such are the authorities to be adduced in favour of the validity of settlements containing provisions for future contingent separations. But since the unequivocal opinions of modern judges appear to be that the Courts have already proceeded too far, consistently with policy and morality, in establishing deeds of separation, and as the case of *Rodney* v. *Chambers* (the principal one upon this subject) is considered by the profession as virtually over-ruled by the decisions of *Abbott* and *Dallas*, Chief Justices, in the year 1819, on a writ of error in a case of *Titley* v. *Durand* (differing, however, from the former case in this particular, that the future separation was not made dependent upon the consent or approbation of the trustees), it may be considered that a deed or settlement providing a separate maintenance for a wife, or an intended wife, in the event of future separation, either with or without the consent of

(*a*) Stated 13 East, 171, in notis.

trustees or other persons, is a provision which will not be enforced either at law or in equity.

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When husband and wife have resolved to separate and live apart, then since she cannot by law contract with her husband, it is necessary that the provision agreed to be allowed by him on that occasion, should be either vested in trustees, or secured by his covenant with them. And in order to support the provision against his creditors, the transaction must be supported by a *valuable* consideration, as the covenant of the wife's trustees to indemnify him against her debts (*a*). But if there be no creditors the husband himself will be bound (*b*). This introduces the subject proposed secondly to be considered, viz.: the validity of deeds of separation against the husband's creditors.

The same rules apply to these as to other *post*-nuptial settlements.

II. With respect to settlements upon the wife made on mutual agreement between her and her husband to live apart, since these provisions are made *during* the marriage, what has been before said in regard to settlements made *after* marriage (*c*), also apply in general to those now under consideration,—

If, therefore, a settlement be merely in consideration of an agreement between husband and wife to live separate, it will be void against creditors and purchasers, the statutes of the 13th and 27th of Elizabeth, extending to such a deed and to such a consideration.

Thus, in *Fitzer* v. *Fitzer* (*d*), *A*, the wife of *B*, being intitled to an annuity of £50, she and her

(*a*) For the form of a deed of separation, see Append. No. 19. (*b*) 2 Atk. 511. (*c*) See vol. 1. p. 306, et seq. (*d*) 2 Atk. 511.

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husband agreed to live apart; and *B* covenanted with trustees, in a deed of separation, to allow *A* a separate maintenance of £14 *per annum* out of his own estate, and £24 a year more out of her said annuity, also £12 to his daughter by her. In order to secure these payments, *B* assigned the annuity to the trustees. The husband afterwards took the benefit of the then insolvent debtors act; and in a suit by *A* and her daughter against *B*, and a creditor of his subsequently to the deed (who was also assignee under the act), to have the trusts of the deed performed, *Lord Hardwicke* declared that the deed was void against the creditor, but good against the husband.

And they are good against creditors, &c. when made for a valuable consideration, as if husband be indemnified against wife's debts.

Similar to other settlements *after* marriage, and before considered, these provisions upon separation may be obligatory upon creditors and purchasers when made for *valuable* considerations. Accordingly if a person, or trustees, covenant with the husband to indemnify him against his wife's debts, the settlement will be good against his *then* present or *future* creditors, and also against subsequent purchasers.

Thus, in *Stephens* v. *Olive* (*a*), *A* was intitled to certain real estates for life, subject to a mortgage for £500, and he and his wife agreed to live apart; *A* therefore conveyed his life-estate to trustees, first, to keep down the interest of the mortgage, then to pay taxes, &c. and, finally, an annuity of £35 to *B* as separate maintenance. The trustees covenanted to indemnify *A* against the debts which *B* might con-

(*a*) 2 Bro. C. C. 90. Ed. by *Belt*. King v. Brewer, in a note to that case, p. 93, S. P. See also p. 386, in the same volume.

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tract *after* the separation. The trustees entered into possession of the premises, and afterwards a judgment was obtained against *A*. The creditor instituted the suit to set aside the settlement as being *voluntary*. But *Lord Kenyon*, M. R., was of opinion that the settlement was good, and declared that the covenant by the trustees to indemnify the husband against the debts which the wife might contract after the separation was a valuable consideration, and supported it, although it was made *after* the debt due to the plaintiff was contracted. Again,

In *Worrall* v. *Jacob* (*a*), *A*, a trader liable to the bankrupt laws, and *B*, his wife, executed a settlement after marriage, by which the estate in question, originally her property, stood limited in default of issue of their bodies to the survivor of them in fee. A separation afterwards taking place between them, *A* covenanted with a trustee, in a deed of separation, to pay to *B* an annuity of £70, and to convey his contingent estate in fee to such persons as *B* should by deed or will appoint. The trustee, on his part, *covenanted* to indemnify *A* against *B*'s debts, and against any demand for *alimony* which she might at any time make. *B* made an appointment in favour of the plaintiffs. *A* survived *B*, and became a bankrupt and died. The question was between the appointees of the wife, and the assignees of the husband. And *Sir William Grant*, M. R., determined that the covenant by the trustee being founded upon a *valuable* consideration, supported the deed of separation against the assignees.

(*a*) 3 Meriv. 256.

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It is observable, in the last case, that the covenant extended its indemnity to the wife's claim of *alimony* in the Ecclesiastical Court, and it seems that in instances where there is no indemnity to the husband against the debts which the wife may contract, yet if, from his cruelty or other misconduct towards her, he give her a title in that Court to separation and alimony, then the consideration of the wife not prosecuting such her right, but consenting to accept amicably of a settlement in lieu of such alimony, will support the transaction against creditors and purchasers.

Or if the wife relinquish the title which she may have to alimony in the Ecclesiastical Court.

Accordingly, in *Hobbs* v. *Hull* (*a*), the husband (the defendant) being indebted to the plaintiff in judgments and otherwise, a separation took place between him and his wife; upon which occasion he settled part of his real estates, to the yearly amount of £300, upon his wife for separate maintenance, and on the children of the marriage. It appeared that, previously to the separation, the husband had lived in a state of *adultery;* and it was insisted, in answer to the bill filed by the judgment creditor to set aside the settlement as voluntary, that since the wife was, in consequence of her husband's misconduct, intitled to a divorce *a mensâ et thoro*, and consequently to an allowance for alimony, her acceptance of the provision by settlement in lieu of alimony was a valuable consideration, which supported the deed against the husband's creditors. And so it was determined; the Master of the Rolls thus expressing himself; "I am now bound to decide the question, whether the

(*a*) 1 Cox Rep. 445.

husband having behaved so ill as to intitle his wife to obtain a divorce in the Spiritual Court *a mensâ et thoro*, and to have a proper allowance from him, if the wife, instead of strictly prosecuting that right, meet the husband in the threshold, and say she will accept the maintenance proposed by him without litigation, whether this can be said to be such a voluntary act as to be fraudulent against creditors. Surely this settlement can never be said to be without consideration, when the wife in this case agrees to accept this settlement, instead of resorting to enforce her rights in the Ecclesiastical Court; surely she is giving up something for it. I am therefore very clearly of opinion, that this is not one of those agreements which the statute of Elizabeth meant to prevent. I do not go upon any motives of compassion, when I decree as I am now about to do, not upon the conduct of the parties, but upon the *rights in law*, which I take to exist between them. And I shall dismiss this bill with costs as to all parties but the husband, and as to him without costs."

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The principle of the last case was recognised by the Court of King's Bench, in *Nunn* v. *Ladbrooke* (*a*).

In that case the husband received £1800 with his wife, his own property being about £200 only. He contracted several debts, and having used his wife with *great cruelty*, they agreed to live apart under a deed of separation, by the terms of which he, in consideration of £200 lent by *A*, and paid to the husband on the part of the wife, and of the agreement to live separate, and in order to make provision

(*a*) 8 Term Rep. 521.

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for her, assigned to trustees all the farming stock belonging to his farm at *P* (which farm he proposed to quit and assign in consideration of the £200), cattle, corn, &c. household goods and furniture, chattels and effects, upon or belonging to the farm, or wherever else the same might be, together with his interest in the lease, and all debts then owing to him, in trust, at the discretion of his trustees, either to carry on the farming business, or to sell his property and collect his debts, &c.; and with the proceeds (after deducting the expenses of sale, &c. and repaying *A* the £200 advanced by him, with all other monies due to him by the husband), in trust to pay all or such part of the husband's debts as they should think proper, and the residue or surplus to the wife for her separate use and disposal. The trustees entered upon their trust immediately after the execution of the deed, sold the greatest part of the goods, &c. and, after a proper advertisement, paid all such of the husband's creditors as sent in their demands twenty shillings in the pound, after which there remained a balance of £329 : 19 : 1, exclusive of some articles bought in by one of the trustees, and enjoyed by the wife on the farm, of the value of £111, and of the lease of the value of £500. After the separation the wife resided constantly upon the farm, and received the produce or profits by the hands of the trustees. About *two months* after the execution of the deed, the husband became a bankrupt, and having died intestate, the assignees sued the wife as *executrix de son tort*, so that the question for the Court to decide was, whether the deed of separation was or was not void against the subsequent creditors of the husband?

And the Court was of opinion that it was good, as being neither fraudulent nor voluntary. And *Lord Kenyon* observed (amongst other things), "that very small considerations had been holden sufficient to give validity to a deed where, in framing family settlements, limitations were made in favour of the distant branches of the family. Such remainders were not considered voluntary if the object of the parties making the settlement was fair and honest; but that the present was a much stronger case, for here there was an *immediate* consideration; independently of the provision for the husband, *he was relieved from the consequences of a suit in the Spiritual Court.*" The other judges coincided in opinion with his Lordship.

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III. With respect to the jurisdiction of Courts of Equity upon the subject of separation *in pais*, it may be considered as a general rule that they will not infringe upon the jurisdiction of the Ecclesiastical Court by enforcing the performance of a mere personal contract entered into between husband and wife to live apart. In *Worrall* v. *Jacob* (*a*), this was considered by *Sir William Grant*, M. R., to be settled; and in *Wilkes* v. *Wilkes* (*b*), the husband by deed agreed that his wife should live separate from him; but *Sir Thomas Clarke*, M. R., refused to carry such agreement into execution, saying, that such a subject was not within the province of a Court of Equity. Indeed whether the contract be executory as resting in articles, or be complete as by deed, and the trusts declared, the Court will not decree the performance

Courts of Equity will not enforce an agreement for separation.

(*a*) Meriv. 268. (*b*) 2 Dick. 791.

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of an agreement or covenant for the separation of husband and wife (*a*).

Yet they will oblige the husband to perform his agreement to pay separate maintenance.

But notice must be taken of an anomaly which has arisen out of the modern species of divorce, that seems to set reason and principle at defiance. It is the doctrine now established, that although the Court will not in direct terms decree a separation between husband and wife, yet that it will do so indirectly by compelling the husband to perform his agreement to pay separate maintenance. *Sir William Grant,* in the above case of *Worrall* v. *Jacob,* notices the singularity, and after alluding to the Court's refusal to carry into execution articles of separation between husband and wife, proceeded thus, " it should seem to follow that the Court would not acknowledge the validity of any stipulation that is merely accessary to an agreement for separation. The object of the covenants between the husband and the trustee is to give efficacy to the agreement between the husband and the wife, and it does seem rather strange, that the *auxiliary* agreement should be enforced, while the *principal* agreement is held to be contrary to the spirit and policy of the law. It has, however, been held that engagements entered into between the husband and a third party shall be held valid and binding, although they originate out of and relate to that unauthorised state of separation in which the husband and wife have endeavoured to place themselves. I am, therefore, only to repeat what *Lord Eldon* has said in the case of *Lord St. John* v. *Lady St. John,* viz. ' if this were *res integra* untouched by

(*a*) 3 Atk. 550.

dictum or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this Court. But if dicta have followed dicta, or decision has followed decision, to the extent of settling the law, I cannot upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled law upon the subject.'"

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The cases, however, have established the distinction between a decree for a separation and one for maintenance under the husband's agreement, as will more fully appear from the cases after stated.

As to Courts of Equity decreeing performance of husband's agreement for separate maintenance when such agreement is between himself and wife only.

It has been observed that a married woman is by law unable to contract with her husband or any other person. A Court of Law, therefore, cannot interfere to compel payment by the husband of an allowance stipulated to be made to his wife upon an agreement between themselves without the intervention of trustees. It may then be inquired whether a Court of Equity will decree the performance of such an engagement by the husband upon his and wife's mutual agreement to live separate, when the contract is between them alone, and is merely executory? If the answer were given upon consideration of actual decisions, without regard to dictum upon dictum not amounting to decision, there would be no difficulty. The answer might be this; the Court, when called upon to act on behalf of the wife to compel her husband, *after* separation, to perform his part of his agreement with her, viz. to pay her the maintenance which he engaged to do, would so decree regardless of there being no trustees who were parties to the agreement, an omission which, as has been before observed, the Court has held not to be an insuperable objection to a wife taking property either from her

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husband or a stranger (*a*); for it being once established that settlements made in consideration of mutual agreements to live separate are valid, (and that they are so cannot be disputed, if case upon case have the effect of settling the law), it follows, that the husband must be bound by his stipulations; and it seems to be immaterial in equity whether he agree with a trustee or herself to allow her maintenance, or whether there be or be not any consideration for the provision, except that of the agreement to live separate so far as the obligation of the husband is in question. And with respect to the objections of policy and inconvenience, it is presumed that it is not reasonable to confine them exclusively to this case so as to prevent the interference of the Court; since the same objections are equally applicable to instances when the agreements are made with the wife's trustees, notwithstanding which the Court's interposition is now settled and of frequent occurrence. But this reasoning is inapplicable when either the husband or wife apply to the Court for an appropriation of the produce of her property as maintenance, in order to enable her and her husband to carry into effect their *intentions* of separation; because that would almost amount to a direct decree for a separation, which has been shown not to be within the province of a Court of Equity. Besides the Court would not give its sanction to the wife's parting with her property upon such a consideration. This appears to have been *Lord Thurlow*'s opinion, in *Durand* v. *Durand* (*b*).

Those Courts will not interfere to enable the parties to complete intended separation.

In that case, a separation having been agreed upon,

(*a*) *Supra*, page 152. (*b*) 2 Cox Rep. 207.

which afterwards took place, the terms were that of £6050 bank annuities, the wife's separate property, £1500 should be paid to her and the residue to her husband, which the wife said she was desirous of parting with for the *sake of living separate.* The Chancellor said, he could not find himself justified in interfering in any manner in a business of *that sort,* where the wife was clearly intitled to the whole, but acceded to the terms of giving up two thirds *for the sake of the separation;* his Lordship therefore dismissed her bill filed to accomplish the above object.

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To the principle of a Court of Equity declining to do any thing which may tend to the continuance of a divorce between husband and wife under their mutual agreement to live apart, when the husband is under no obligation to allow separate maintenance, may be ascribed the decision of the case of *Duncan* v. *Duncan* (*a*); by which the Court refused to decree to the wife separate maintenance out of her own property whilst she lived apart from her husband by their mutual consent, no improper conduct being imputable to him, and she not being destitute of all provision.

Nor to continue it by giving separate maintenance when the husband is under no engagement to make the allowance.

The case was to this effect. The wife at the time of her second marriage was intitled, under the will of her first husband, to a part of his personal estate vested in trustees, and also to £3000 in her own right. The latter sum was settled upon her in contemplation of the second marriage, but her second husband made no provision for her out of his own property. They by mutual agreement lived apart,

(*a*) Coop. C. C. 254.

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the reasons for which did not appear. During the separation, the wife by bill in equity prayed a settlement to her separate use of the property to which she was intitled under her former husband's will. But *Sir William Grant,* M. R., dismissed the suit, observing, that the *only* facts were, that the husband and wife did not live together, the cause of the separation not appearing; and that no provision for her was made by him in addition to the settlement. Upon such a state of facts, his Honor said, that he did not find any instance in which the Court had ever decreed *separate maintenance* to the wife either out of her husband's property or her own; that the cases in which the Court had interfered were, where the husband had been guilty of cruelty, or turned his wife out of doors, or quitted the kingdom without making any provision for her, but that where the case went no farther than that *merely* of husband and wife living apart, he could find no authority for decreeing separate maintenance to her, still less for making any *addition* to what had been already settled upon her (*a*).

Separation by mutual agreement will not exclude husband's title to wife's accessional fortune upon his making an additional settlement.

In the last case it is observable that the property in question belonged to the wife *when* the settlement was made; a circumstance which, it is presumed, distinguishes it from the case of *March* v. *Head* (*b*), next stated; and it is conceived that *Sir William Grant* did not intend to decide, that if an accessional fortune came to the wife *during* the separation, she was not intitled to a settlement out of it.

(*a*) As to separate maintenance, see vol. 1. p. 273, et seq.
(*b*) 3 Atk. 720. And see vol. 1. p. 293.

In *March* v. *Head*, last referred to, the wife had £1000 to her fortune, and no other provision under articles before marriage than her husband's covenant that he would consider himself as a freeman of *London*, and that if she survived him she should have such a share of his personal estate as belonged to the widow of such a person. *They lived separate.* Upon the deaths of her father and mother she, as their next of kin, became intitled to £1800 more, and an application was made on her behalf for a further provision in consequence of this additional fortune. And *Lord Hardwicke* was of opinion that she was intitled to such a provision, and referred it to a master to receive proposals from the husband for a further provision on behalf of the wife, in proportion to the £1800.

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The above case shows that a mutual separation by consent will not deprive the husband of his right to the personal property which may accrue to his wife whilst they continue in that state, upon the terms of his making a provision for her out of it.

Lord Rosslyn, in the case of *Legard* v. *Johnson* (*a*), and *Lord Eldon*, in *Lord St. John* v. *Lady St. John* (*b*), expressed strong doubts upon the validity of a contract entered into between husband and wife alone to live separate, and consequently of the Court's jurisdiction to enforce that part of it by which the husband engaged to pay her a separate allowance. The latter judge observed, in the case last mentioned, that the question had never been put upon the contract of the husband and wife; but that the

Doubts expressed on validity of agreements of separation entered into between husband and wife alone.

(*a*) 3 Ves. 352. (*b*) 11 Ves. 532.

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Court had always put it upon the contract between the husband and the trustee, from the covenant of the trustee to indemnify the husband against her debts. Hence *Lord Eldon*'s opinion, always of great weight, but in this instance not a decision, seems to be that the Court ought not to decree the husband to allow maintenance upon his agreement with his wife to pay it, and not even when the contract is made between him and her trustee, unless the husband be indemnified against her debts. His opinion, with that of *Lord Rosslyn*, is of such importance as whatever may be the conclusion to be drawn from actual decisions upon this subject, those opinions must have the effect of producing uncertainty as to what future decisions may be in cases where the above ingredients are wanting. The authorities I shall now advert to, including such cases as rest merely in agreement between the husband and wife, as also those where the contract was between him and a third person acting for the wife, and where the husband has been indemnified against her debts, and when no such indemnity occurred.

Cases considered in which Courts of Equity have assumed jurisdiction upon articles of separation between husband and wife alone.

1. The cases first to be considered are those which relate to agreements for separation entered into between husband and wife alone.

In *More* v. *Ellis* (*a*) the wife had abandoned her husband, and during her elopement became possessed of considerable property, which was vested in trustees for her separate use and disposition. The husband having met with her took possession of her person, and on the following day articles of agreement were

(*a*) Bunb. 205.

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entered into between them, by which in consideration of his permission for her to live apart, she engaged to settle upon him £200 a year for life, and to pay him £1000 out of her *separate* estate. Upon the bill of the wife to be relieved against, and the bill of her husband for a performance of the articles, the Court of Exchequer, after an issue at law, finding that they were voluntarily executed by the wife, confirmed the transaction (*a*).

This case affords two inferences: first, that the Court considered there was no objection to the transaction on the ground that it rested in articles only between husband and wife; and secondly, that the Court, if there were no undue influence, would enforce the wife's engagements in regard to her separate estate through the medium of her trustees, since she was competent to dispose of it as a feme sole; this case differing from that of *Durand* v. *Durand* (*b*), before stated, in the following particular, viz. that in the present instance it is to be presumed that the separation *had* taken place upon the faith that the articles would be performed, but in that case the *separation depended* upon the Court enabling the wife by a disposition of her separate estate to perform her part of the agreement for a separation then intended and which had not taken effect.

The next and only case that I have been able to find upon this subject is *Guth* v. *Guth* (*c*), the authority of which, although doubted, has not yet been over-ruled. It is an express decision by *Lord Alvanley*, after great research and consideration, that a

(*a*) Decree affirmed in the House of Lords, 1 Bro. Parl. Ca. 237, 8vo ed. (*b*) 2 Cox, 207, *et supra*, p. 288. (*c*) 3 Bro. C. C. 614.

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Court of Equity will assume jurisdiction and enforce the husband's contract entered into with his wife alone, and compel him to pay the maintenance which he stipulated to allow on their agreement to live separate.

The husband and wife having resolved to live apart, the terms, as agreed upon between them, were contained in a deed poll signed by the husband, by which he stipulated to allow, pay, or cause to be paid to his wife £100 a year for life, for the maintenance of herself and her child; and if she contracted debts without his consent which he should be compelled to pay, the agreement was to be void. The annuity being unpaid, the wife filed a bill for recovery of the arrears; and the Court decreed payment, after an examination of almost all the prior cases.

This unsettled point must be now left to the judgment of the reader, until the last case shall be either confirmed or repealed by a solemn adjudication. In appreciating the degree of authority to be given to that case, he will remember the patient industry and great knowledge of the Judge who decided it, and that he made his decree after the inconvenience which might arise in consequence of the jurisdiction of the Ecclesiastical Court had been pressed upon him (*a*).

Cases on agreements of separation between husband and a *trustee* for the wife, when no indemnity was given to husband against her debts.

2. The second class of cases are those where the contract was between the husband and a third person acting for the wife, and no indemnity was given to the husband against his liability to pay his wife's debts.

Upon this subject it will appear from the cases

(*a*) On this point see Pre. Ch. 498.

DEEDS OF SEPARATION, HOW CONSIDERED IN EQUITY.

next stated that the wife has precisely the same right as any other *cestuique trust*, to call for the execution of a trust created in her favour. It is a consequence from this proposition that whether the deed of separation securing to her maintenance be purely voluntary, or be supported by a valuable consideration, as the covenant of her trustee to indemnify the husband against her debts, she will be intitled in either case to call for an execution of the trust (*a*).

Turner v. *Boteler* (*b*) is a case where the agreement was between husband and wife for a separation, which agreement was completed by a deed demising lands to trustees in trust to apply the rents in payment of an annuity of £300 for the wife's maintenance. In a suit by the trustees against the husband and the tenants of the premises, *Lord Nottingham*, with the consent of the parties, ordered all arrears to be paid, and further that the husband should not molest his wife in her person, nor interfere with any goods which she should acquire.

It does not appear that the husband was indemnified against his wife's debts, and it is to be presumed that if for any reason this transaction had been illegal or improper, his Lordship would not have made the above decree even with the consent of the parties.

In *Angier* v. *Angier* (*c*) (which it may be inferred from the decree did not contain any indemnity to the husband against his wife's debts), the husband by articles agreed with a trustee to allow his wife £52

(*a*) 13 Ves. 443. 18 Ves. 99. (*b*) Finch, Ch. Ca. 73; and see Fitzer v. Fitzer, 2 Atk. 511, and stated *supra*, p. 279. (*c*) Pre. Ch. 496.

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a year, and to permit her to live where she thought fit without molestation. This agreement was made while a suit by her was pending in the Ecclesiastical Court for separation and alimony. The allowance being in arrear, she filed a bill for the payment of it, and the Court so decreed.

Head v. *Head* (*a*) also falls within this class of cases. There a separation took place, and during its continuance the husband wrote a letter to *B*, the wife's father, agreeing to pay to her £100 a year quarterly so long as they should *continue* separate. The allowance being in arrear, she instituted a suit to recover it, which *Lord Hardwicke* decreed to her.

Courts of Equity have undoubted jurisdiction when husband is indemnified against wife's debts.

3. It having been established by the cases last stated and referred to in the notes, that the Court will execute a voluntary agreement of the husband entered into with a third person to allow his wife maintenance upon their separation, *a fortiori*, the Court must do so when the husband receives a *valuable* consideration for such his engagement, as the covenant of a trustee to indemnify him against his wife's debts. Some of the cases upon this subject are mentioned below (*b*).

When the property the subject of agreement on separation is the wife's.

4. The authorities which have been stated in this chapter, with the exception of *More* v. *Ellis*, and *Durand* v. *Durand* (*c*), are instances where the property belonged to the husband. In the two excepted cases the property was the wife's, as it also was, either wholly or in part, in the cases next stated and

(*a*) 3 Atk. 547, 551; and see Fletcher v. Fletcher, 2 Cox, 99. Cooke v. Wiggins, 10 Ves. 191, and Seagrave v. Seagrave, 13 Ves. 439. (*b*) Seeling v. Crawley, 2 Vern. 386. Stevens v. Olive, 2 Bro. C. C. 90. (*c*) Bunb. 205. 2 Cox, 207.

referred to, and no objections were taken to the validity of the transaction on that account.

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In *Fitzer* v. *Fitzer* (*a*), the wife's maintenance was provided out of the joint estates of her and her husband.

And in *Bright* v. *Chapman* (*b*), by articles of separation the husband covenanted not to molest his wife, and he was to receive an annuity out of *her* property, which had been assigned to trustees. Upon his bill for payment of the annuity out of the wife's estate, and after a defence that he, contrary to his engagement, had molested his wife, the Court of Exchequer directed an issue to ascertain that fact, which it is presumed it would not have done if the articles had been considered not obligatory either from the circumstance of the wife being to receive no maintenance from the husband, or of his being to receive a benefit out of her property.

Probable rule on this subject.

This question may probably be thus considered: Since a married woman may dispose of personal property limited to her separate use as a feme sole, and may even give it to her husband, there appears to be no reason why she should not be competent to make it the subject of settlement upon a mutual agreement between her and her husband for a separation. And with respect to her other property not so circumstanced, if it have been reduced into possession, or being in action if it be assigned to trustees, with the consent of the wife and the concurrence of her friends, upon the trusts of the articles of separation (*c*), it is presumed that her estate will be

(*a*) 2 Atk. 511, stated *supra*, page 279. (*b*) 2 Anstr. 345.
(*c*) See the last case.

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bound by the trusts: in the first case, because by the reduction into possession it became the husband's property and liable to his disposition; and in the second case, since the settlement was made with due regard to the wife's interest, and with the concurrence and agreement of her friends on her behalf (*a*), and she might by consent in Court have given the whole fund to her husband (*b*), if, *after* the separation, she or her husband be obliged to apply to the Court to subject her estate to the trusts of the deed or articles of separation, it should seem that the Court would act upon her consent as to the application of the property. But in the absence of *modern* authority upon this latter point, and considering the aversion of Courts of Equity to interfere in those cases, this may be considered as a point unsettled.

Wife's equities when her trustees refuse to act, or the deed of separation is lost.

It is a consequence of what was before stated in regard to the wife's right to call for the execution of the trust declared in her favour in a deed of separation, and to the same equity in all respects as any other *cestuique trust*, that if her trustees refuse to act, or the deed has been destroyed, she, in the one case, will be intitled to have the trust performed, and in the other to have the loss of the instrument supplied.

Accordingly, in *Seagrave* v. *Seagrave* (*c*), upon the separation of husband and wife he executed a bond to a trustee for payment to her at the house of *B* of an annuity of *5s.* a week during his *life*, but she was to be permitted to live where she pleased.

(*a*) See Lannoy v. Athol, 2 Atk. 448, and the inference deducible from *Lord Hardwicke's* judgment: the case is stated *supra*, vol. i. p. 302. (*b*) *Supra*, vol. i. p. 262. (*c*) 13 Ves. 439.

DEEDS OF SEPARATION, HOW CONSIDERED IN EQUITY.

The bond was burnt by the trustee with the husband's privity and consent, and a bill was filed by the wife for arrears of the annuity, and for the execution by her husband of another bond to a new trustee. The husband in defence insisted upon the circumstances of her leaving the house of *B* where she resided, and living in adultery, both of which facts were proved. And *Sir William Grant*, M. R., after remarking that adultery was no bar to the wife's demand, directed that she should be at liberty to bring an action in her trustee's name upon the bond, the destruction of which was admitted in the answers of the husband and of the trustee; his Honor observing, that the question which had been made between the parties with regard to the real tenor of the condition would be open, and that it was more fit that such question should be investigated at law than in that Court.

Adultery of wife after separation no bar to her separate allowance.

So also in *Cooke* v. *Wiggins* (*a*), the husband gave a bond to a trustee for payment to his wife of £30 a year during their separation. The annuity having fallen in arrear, the trustee refused to enforce the bond without an indemnity. The wife, therefore, instituted a suit for payment of the arrears, and also to have the future payments secured, and a fund appropriated for the purpose. But the same Judge, although he decreed payment of the arrears, declined ordering an appropriation, assigning as a reason, that a man by granting an annuity did not engage to bring into Court a sum of money sufficient to answer it; and he observed that the very principle

But the Court will not order an appropriation to secure payment of wife's separate provision.

(*a*) 10 Ves. 191.

DEEDS OF SEPARATION, HOW CONSIDERED IN EQUITY.

of granting an annuity was that the grantor might be able to pay by degrees what he had no means of paying at once.

Apportionment.

The motive of the husband in making a separate allowance to his wife upon their separation by mutual agreement, being for her support and maintenance, it is a necessary consequence that such allowance will be *apportioned* upon the death of the wife between the last and accruing times of payment. This was done at law in the case of *Howell* v. *Hanforth* (*a*).

In that case a bond was given by the husband to his wife's trustee to pay her £80 a year quarterly. He also gave a warrant of attorney to confess a judgment on the bond. The judgment was entered up, and writs of *fieri facias* were sued out at different times, all of which were satisfied except the last, which was for £78; in regard to which it was ordered that it should be set aside on payment of all arrears and costs, and that the judgment should stand as a security for *future* arrears, with liberty to apply to the Court to sue out fresh executions. The wife being dead, leave was asked to take out execution for the *proportional* arrears of the annuity between the last quarter day of payment and the death of the wife; and the Court granted the application upon the principle that the annuity was for the separate maintenance of a married woman, settled upon her by her husband, a circumstance which distinguished and excepted it out of the general rule applicable to other cases.

(*a*) 2 Blackst. Rep. 843, 1016. See also Hay v. Palmer, 2 P. Will. 502.

WIFE'S POWER OF DISPOSITION OVER HER SEPARATE MAINTENANCE.

IV. Having in the preceding section considered the effects of deeds of separation at law and in equity, the next subjects to be treated upon will be, the wife's power of disposition over her separate maintenance; its liability to her debts; and her husband's responsibility for her engagements contracted during the separation.

Wife's power to dispose by anticipation of separate maintenance.

1. The question as to the wife's power of absolutely disposing of the funds settled upon her by her husband, in consequence of their mutual agreement to live separate, is one which does not appear to have been finally settled. The adherents to one opinion contending, that the allowance being made for the wife's *maintenance*, she cannot alien it by anticipation; whilst the persons who entertain the contrary opinion argue, that the wife being a feme sole in regard to this provision, there is no distinction between the present case, and the ordinary one of a limitation of property to the wife's separate use; so that the *jus disponendi* applies to each case indiscriminately.

Of the first opinion *Lord Alvanley* is supposed to have been, from the case of *Hyde* v. *Price* (*a*), in which (so far as it is necessary to state for the present purpose) the trust of £2500, 3 per cent. Bank annuities, was declared to permit the wife to receive the dividends for her *maintenance* and support during the joint lives of herself and husband. She and her husband by bond and warrant of attorney, in consideration of £560 advanced by *B*, and applied in purchasing a commission in the army for the wife's

(*a*) 3 Ves. 437.

WIFE'S POWER OF DISPOSITION OVER HER SEPARATE MAINTENANCE.

son, secured an annuity to *B* payable out of the £2500 Bank annuities and the dividends. *Lord Alvanley*, M. R. held, that the grant of the annuity out of the dividends could not be supported against the wife; and he said that the dividends limited in trust for her as above, were not property to which she was intitled to her sole and separate use; that there was a *special trust* upon them; that she had *no dominion* over them; that her remedy for a misapplication was in that Court, and that the grant made by her was in defiance of the deed, which therefore could not be enforced in a Court of Equity.

The observations upon the last case are these, that the property was not limited to the separate use of the wife; it was vested in trustees upon trust as to the dividends for the wife for maintenance; she had no interest in the fund distinct from the special trust declared to be for her maintenance and support. It seems therefore to be a necessary consequence, that any disposition by the wife contrary to the trust could not be enforced in a Court of Equity. This case, then, appears to have been determined upon the special limitation in the deed, and not upon the general proposition that in no instance can a wife dispose by anticipation of the provision settled on her by her husband in a deed of separation. And it should seem, that where the property is so settled by the husband upon separation, as to vest it in the wife for her *separate use*, consistency requires that she should have the same powers of disposition over it, as over funds given to her in the like form of settlement by any other person. This distinction appears to reconcile all opinions upon the

subject, and particularly what seems to have been the opinion of the Court in the case of *Greatley* v. *Noble* (*a*); for there the trust of *Lady Pomfret's* allowance upon separation was declared to be for such intents and purposes as she should notwithstanding coverture direct or appoint, and in default of appointment for her sole and *separate use* and disposal. She was, therefore, by the effect of the above limitation a feme sole of the settled property, to which character attached the powers of disposition which have been before noticed (*b*).

RIGHTS OF WIFE'S CREDITORS UPON HER SEPARATE MAINTENANCE.

As the wife may dispose by will of savings from her separate estate limited to her sole use by a stranger, so also she may dispose of *savings* from her separate maintenance (*c*); but if she make no disposition, and her husband be the survivor, he will be intitled to them as her administrator (*d*), subject to her separate debts; and during the wife's life her savings will not be liable to her husband's engagements, if the settlement were made for a valuable consideration (*e*).

Savings.

2. The intent of the provision made for the wife upon separation being to enable her to procure necessaries, it follows that the application of it to those purposes, however it may have been settled, is a legitimate appropriation of the property.

Rights of wife's creditors upon her separate maintenance.

But it has been intimated from authority, that the same necessity exists that the wife should manifest an intention to charge her separate maintenance with the debts of particular creditors (*f*), as it has

(*a*) 3 Mad. 79, 94. (*b*) *Supra*, p. 185, *et seq.* (*c*) 2 New Rep. C. P. 159. See also *supra*, pp. 136, 175. (*d*) Vol. i. p. 203. (*e*) *Supra*, p. 280. (*f*) Greatley v. Noble, 3 Mad. 94.

RIGHTS OF WIFE'S CREDITORS UPON HER SEPARATE MAINTENANCE.

been before shown to exist (*a*) to intitle her creditors to a claim upon her separate estate when not settled upon her for support and maintenance upon separation. It is however to be observed, that there appears to be a wide difference in principle between the two cases; for when the property is limited to the wife's *separate* use, and she cohabits with her husband, the creditor has the husband's security for payment of the debt contracted by the wife for necessaries; it is but just, therefore, to require some evidence of an agreement between her and her creditor that her separate estate should be applied in satisfaction of his demand. But when the creditor is deprived of the husband's security, by the allowance to the wife of a yearly sum for maintenance upon separation, i. e. for the express purpose of discharging her necessary debts, it seems but reasonable that a Court of Equity should consider this to be such an *appropriation* of the fund for those demands, as to intitle her separate creditors to maintain a suit in equity to subject it in the hands of her trustees to the satisfaction of their debts. *Lord Thurlow* seems to have had this distinction in view in *Lilia* v. *Airey* (*b*) (a case of separation), when he expressed himself thus:—"Upon the question whether a creditor has a right against the separate estate of the wife, and against the husband as allowing it to her, my opinion is, that *primâ facie* a creditor has such right."

Equities of wife's *general* creditors.

Equities of *particular* creditors.

Whatever may be the decision upon such a case when brought before the Court, there is no doubt

(*a*) *Supra*, p. 241, *et seq.* (*b*) 1 Ves. jun. 277.

that when the wife's intention appears, or is inferred to charge her separate maintenance with a debt for necessaries, it will intitle the creditor to a satisfaction of his debt out of the fund provided for such maintenance.

HUSBAND'S LIABILITY TO HIS WIFE'S DEBTS DURING SEPARATION.

Thus, in *Stuart* v. *Lord Kirkwall* (*a*), the separate maintenance settled upon the wife was £1600 a year. She accepted a bill of exchange drawn upon her by a milliner for £339 14*s.* 6*d.* and interest, which bill being dishonoured by the wife, a suit was instituted for payment of the debt, not only out of the money then due in the hands of her trustees in respect of her separate maintenance, but also out of future accruing payments, and for an injunction to restrain the trustees from paying any more of the annuity to the wife. After the answers had been filed, application was made to *Lord Eldon* for an injunction, and that the annuity, as it became due, might be paid into the Bank, &c.; and his Lordship made an order to that effect. The cause having been afterwards heard by the present Vice-Chancellor, he decreed according to the prayer of the bill.

3. The next consideration is how far the allowance of separate maintenance to the wife will discharge her husband from the payment of her debts.

Husband's liability to his wife's debts during separation.

The obligation of the husband to maintain his wife, and to supply her with necessaries suitable to his fortune and rank in life, has been before mentioned (*b*). This obligation continued at the common law, and still continues except she forfeit it by

(*a*) 3 Mad. 387. (*b*) *Supra*, p. 112.

HUSBAND'S LIABILITY TO HIS WIFE'S DEBTS DURING SEPARATION.

great misconduct, as by adultery, &c.; and when the husband is thus discharged from that duty, he is not liable either at law or in equity to her contracts or engagements for those necessaries (*a*). The common law, however, did not permit this obligation of the husband to be discharged in consequence of any agreement of separation entered into between themselves; but when Courts of Law and Equity sanctioned such a divorce by enforcing agreements of separate maintenance, then, in analogy to this discharge at common law, those Courts held that the husband should be equally exempted from his wife's obligations, but they departed from the common law when the analogy between the two cases failed; for in the case now under consideration the wife being free from the imputations upon her conduct, which in the other induced that law to discharge her husband from all liability on her account, the Courts imposed upon the husband the condition that he should purchase his exemption at the price of an allowance for maintenance. Hence the husband will not (as it is presumed) be liable to the debts of his wife, if upon separation he provide her with a proper allowance for maintenance (*b*), and pay it regularly afterwards. What the allowance for maintenance must be to produce that effect, I shall endeavour to collect from the cases.

As to the sufficiency of the husband's allow-

The allowance for maintenance must not be precarious (*c*), and it must be suitable to the husband's fortune and rank in life, which is a question proper

(*a*) *Supra,* p. 117. (*b*) Todd v. Stokes, 1 Salk. 116. 1 Ld. Raym. 444, S. C. 2 New Rep. 148. (*c*) Thompson v. Hervey, 4 Burr. 2177.

for the consideration of a jury; and if it be found to be inadequate, the husband, as it seems, will not be discharged at law from his liability to answer for his wife's contracts for necessaries; and her acquiescence in receipt of the allowance will not affect the rights of her creditors against him (*a*). From the case of *Lambert* v. *Lambert* (*b*) it appears that in this instance a Court of Equity would refer it to a Master to settle the amount of a proper maintenance for the wife during the separation, which, when made, must have the effect of discharging the husband from her future debts.

HUSBAND'S LIABILITY TO HIS WIFE'S DEBTS DURING SEPARATION.

ance for maintenance, to discharge his liability to answer for his wife's necessaries.

Supposing the maintenance to be adequate to the circumstances and condition in life of the husband, it was decided in *Nurse* v. *Craig* (*c*) that it must be duly paid in order to discharge him from his liability to her creditors; the averring of which payment is usual, and seems necessary in the declaration at law. The case last referred to establishes by three judges against the opinion of *Mansfield*, C. J., that the *mere* covenant or contract of the husband to pay separate maintenance will not discharge his common law obligation to support his wife, and that a creditor who has furnished her with necessaries may sustain an action against him for the payment of the debt.

It must be regularly paid.

It has been before noticed, that when the husband is discharged from his liability to answer for his wife's debts, she is not *personally* liable for them; because, as a married woman, she cannot enter into

But wife is not *personally* liable on account of her debts during separation.

(*a*) Hodgkinson v. Fletcher, 4 Campb. Rep. N. P. 70. (*b*) 2 Bro. Parl. Ca. 18, 24, 8vo ed. (*c*) 2 New Rep. C. P. 148, 153, 156.

HUSBAND'S LIABILITY TO HIS WIFE'S DEBTS DURING SEPARATION.

a contract to bind herself (*a*). A consequence of this disability in the wife to contract when living apart from her husband appears in the case of *Smith* v. the Sheriff of *Middlesex* (*b*), which was to the following effect:—

A contract with her passes no right of property.

The wife resided separately from her husband under a deed of separation, securing to her, as it is presumed, a proper separate maintenance. She had been supplied by a tradesman, the plaintiff, with goods and furniture upon hire, but no sum was agreed upon, nor had any period been fixed during which the goods and furniture were to continue on hire. These articles were taken in execution by a creditor of the husband; but before a sale, the plaintiff gave notice to the defendant (the sheriff) that they were *his property;* and that was the question in the action of *trover* which the plaintiff brought against the sheriff to obtain possession of them. The Court held that the tradesman was intitled to recover the goods, upon the principle that the wife could not make a contract for the hire of them; and the Court observed, that a contract to be valid must bind both parties; but that this agreement being by a married woman could not bind her, so that the property in the goods never having been devested out of the plaintiff, he had a right to recover the possession of them.

As to determination of wife's separate allowance.

V. I shall now proceed to inquire what will determine the wife's separate provision for maintenance, and her remedies in case of molestation by her husband during the separation.

(*a*) *Supra,* p. 119, *et seq.* (*b*) 15 East, 607.

WHAT WILL DETERMINE WIFE'S SEPARATE MAINTENANCE.

1. In a prior chapter was considered what would determine a maintenance which had been granted by the Court of Chancery, out of the wife's own property, for her support during the absence of her husband (*a*); and it appeared, that if he offered to live with her, and she refused without a sufficient reason to return to him, such offer and refusal would determine her allowance, because the Court which granted it did so temporarily, viz. till the husband's return and his cohabitation with his wife, if not prevented by his own fault; the Court therefore withdraws the allowance, if cohabitation be prevented by the perverseness or caprice of the wife. But the application of this doctrine does not completely hold in cases where the husband and wife have agreed to live apart, and she has a separate maintenance secured to her by agreement, for that being founded upon *express contract* between the parties, or between the husband and the friends of his wife, it requires the same mutual agreement to dissolve as to make the contract.

The following distinctions seem to have been established in regard to this subject:

Effects of husband's offer to cohabit with his wife.

First, that if the agreement for separation be for the lives of the parties, or until *both* agree to live together again, the wife's consent is necessary to put an end to the allowance of separate maintenance; so that the offer of her husband to take her back again will not have that effect.

Second, that if the agreement for separation be merely temporary, or for an uncertain period, then

(*a*) Vol. 1. p. 275, et seq.

WHAT WILL DETERMINE WIFE'S SEPARATE MAINTENANCE.

the husband's offer to take her back again, if not artfully and insincerely made, will, without regard to her refusal to return, determine her separate allowance.

Of the *first* proposition, *Guth* v. *Guth*, *Hoare* v. *Hoare*, before stated (*a*), and *Gawden* v. *Draper* (*b*), are instances. Of the *second* proposition, the case of *Head* v. *Head* (*c*), is an instance. There the agreement to pay separate maintenance was confined to such time only as the husband and wife should *continue* to live apart; i. e. with the consent of both parties; and *Lord Hardwicke* decreed, that the husband having offered to receive his wife, he should receive and treat her as his wife if she would return to him; but in case she did not return within a month, the maintenance should cease for the future.

The offer of a stranger, liable to pay the separate allowance, to support the wife at his own house, and her refusal to go there, will not determine her allowance.

If, however, a third person covenant for a valuable consideration moving from the husband, to pay to the wife a separate maintenance, who was then living apart from her husband by mutual agreement, it seems that the offer of such person to take her to his house will not exempt him from her demand for the separate allowance, because the law imposes upon her no obligation to reside with such person; besides, if such a residence were accepted by her, it would have no effect in promoting a reconciliation between her and her husband; which is the object the law has in view in withholding the maintenance when it is proper to do so.

(*a*) 3 Bro. C. C. 614. 2 Ridgew. Parl. Ca. 268, and stated *supra*, pp. 276, 293. (*b*) 2 Ventr. 217. (*c*) 3 Atk. 547, and stated *supra*, p. 296.

WHAT WILL DETERMINE WIFE'S SEPARATE MAINTENANCE.

Accordingly, in *Dutton* v. *Dutton* (*a*), *A*, the wife's son, for a valuable consideration, covenanted to indemnify the husband (his father) from all debts, charges, and expenses for the maintenance of the wife, who at that time lived apart from her husband by consent. Upon the wife's bill against her husband and *A* for an allowance for maintenance, *A*, in defence to the claim, *offered* to maintain her at his own house. But *Lord Cowper*, C., ordered her an allowance of £200 a year; his Lordship observing, that *A*, by his covenant, took upon himself the charge of maintaining the wife, and stood in the husband's place, who, under a voluntary separation, was obliged to grant an allowance to her; that *A* was in the nature of a trustee for the wife to the extent of a reasonable allowance for maintenance, and that she was not bound to accept *A*'s offer to take her to his house.

Subsequent cohabitation will have that effect;

If after the separation, the husband and wife be reconciled and live together, that circumstance will avoid the deed or articles, and consequently it will determine the separate allowance; for by cohabitation the separation, which was the principal, having ceased, the maintenance, which was the accessary, must expire with it. This was so considered by *Lord Eldon*, in the case of *Lord St. John* v. *Lady St. John* (*b*), and by *Buller*, J., in *Fletcher* v. *Fletcher* (*c*). The law, in this respect, acts in consistency with the practice of the Ecclesiastical Court, for, in general, when a reconciliation takes place

(*a*) 4 Vin. Abr. 178, pl. 18. (*b*) 11 Ves. 537. (*c*) 2 Cox Rep. 99, 105, 108.

WIFE'S REMEDIES AFTER SEPARATION AGAINST HER HUSBAND'S MOLESTATION.

between the parties, there is an end in that Court of the deed or articles of separation (*a*).

but not the wife's living in adultery.

Instances in which adultery by the wife will and will not be a bar to her relief in equity, have been before noticed (*b*). In the matter now under consideration, this crime will not incapacitate her from compelling her husband to discharge her separate maintenance, because at common law adultery did not affect her right to prosecute her civil claims. Before the statute of *Westminster* the second, she was intitled to dower, as before appears, and the exception of it by a particular provision proves that, in other cases, adultery was no bar to the wife enforcing any of her rights in Courts of Justice. In addition to the authorities stated and referred to in the pages mentioned in the last note, may be added the judgment of *Sir William Grant*, M. R., in the case of *Seagrave* v. *Seagrave* (*c*).

Wife's remedies after separation against her husband's molestation,

2. What next remains to be considered, are the wife's remedies against her husband when she is molested by him during the separation.

Upon this subject, Courts of Law have determined that the husband, by his own agreement, may so far bind himself as to surrender in favour of his wife the right which the common law gives him to her society. This seems to be the principle upon which the cases that will be afterwards cited were determined. *Lord Eldon* expressed disapprobation of those decisions in *Lord St. John* v. *Lady St. John* (*d*); but whilst the doctrine is supported by the opinions and decisions

(*a*) 11 Ves. 537. (*b*) Vol. 1. pp. 283, 517, *et supra*, p. 134.
(*c*) 13 Ves. 443. (*d*) 11 Ves. 532.

of several great men, the law must be considered settled until a solemn review of it take place, and those opinions and decisions are erased from the list of authorities.

WIFE'S REMEDIES AFTER SEPARATION AGAINST HER HUSBAND'S MOLESTATION.

Assuming, then, the above principle to be now established, it is a consequence, that if the husband by covenant, on separation between himself and wife, engage not to disturb her, nor any person with whom she shall reside, and that she may live where and with whom she pleases without his molestation; should he, in breach of his engagement, either under colour of law, or by violence, attempt to seize, or actually seize her person, she may in the one case by filing articles of the peace, or by a supplicavit in Chancery, and in the other by suing out a *habeas corpus*, obtain security for her person against danger, or regain her liberty, as the circumstances may require. Accordingly, in *Lord Vane*'s case, before mentioned (*a*), articles of the peace were preferred by the wife living apart from her husband, and security was ordered to be given by him. The security required was £1000 from himself and two persons as bail in £500 each.

by articles of the peace, supplicavit, and habeas corpus.

It must be noticed that the allegations contained in articles of the peace, will not be permitted to be denied or explained by the husband, by affidavit or otherwise, except so far as such explanation is confined to any ambiguity in the expressions used in the articles (*b*).

Articles of the peace cannot be falsified by husband.

(*a*) *Supra*, p. 278. (*b*) The King v. Doherty, 13 East, 171, and see the cases referred to in that case, and the others in the notes; also the King v. Lee, 2 Lev. 128.

WIFE'S REMEDIES AFTER SEPARATION AGAINST HER HUSBAND'S MOLESTATION.

Supplicavit.

Of a similar nature with articles of the peace at law is the writ of *supplicavit*, issuing out of the Court of Chancery upon articles exhibited by the wife againt her husband. These articles, as those at law, cannot, it is presumed, be falsified by the husband. The reason is, that both of these proceedings are preventive, i. e. to preserve the peace, and restrain the commission of an irreparable injury; and if the person complaining swear that his or her life is in danger, this is a fact upon which the Courts cannot decide, therefore whether at law opposition be made to the Court requiring any security, or for a discharge of it after it be given, or whether opposition be made to the issuing of a supplicavit, or an application be made to discharge the recognizance when entered into, neither a Court of Law nor of Equity will attend to these defences, or applications on account of the possible mischievous consequences (*a*). On the other hand a person is not to continue under penalties or imprisonment the whole of his life. In order, therefore, to do justice, consistently with safety, the general rule at law is to discharge the security if the party, at the end of *one year* after it was given, conducted himself peaceably during that period; which rule *Lord King* said, in *ex parte Grosvenor* (*b*), was reasonable, and that he was disposed to follow it in equity. In *ex parte King* (*c*), *Willes* and *Wilmot*, Lords Commissioners observed, that this general rule admitted of exceptions when the party complaining was under the authority or the influence of the per-

As to the discharge of the securities under this writ and articles of the peace at law.

(*a*) Clavering's case, 2 P. Will. 203. King v. King, 2 Ves. sen. 578. (*b*) 3 P. Will. 103. (*c*) Ambl. 334.

son complained of. It is presumed, therefore, that if the husband do not misconduct himself during the year, but his wife make out a case that when the supplicavit is discharged, he will very probably abuse his authority over her to procure her separate estate (as in *ex parte King*, before referred to), by using her ill and taking her abroad, the Court will not discharge the writ whilst well-grounded fears exist.

WIFE'S REMEDIES AFTER SEPARATION AGAINST HER HUSBAND'S MOLESTATION.

In *Head* v. *Head* (*a*), a writ of supplicavit was issued upon the threat of the husband to take his wife to a madhouse: and it would seem that in all cases where the wife is intitled at law to security against her husband's ill-treatment, or threats of injury to her person, she is equally intitled to the writ of supplicavit in Chancery when, living apart from him under articles of separation, she has a good reason to be afraid for her own safety; but a reasonable foundation must appear upon the face of the articles filed for the writ of apprehension of serious personal danger, and so it is at law (*b*).

The case made by the articles for security must be a well-grounded fear of serious personal danger.

The reader will notice that the conclusionary part of the writ of supplicavit contains a proviso, which proves the husband's right to place his wife under moderate restraint. The writ, after ordering the sheriff to take bail from him to treat and govern her well and honestly, and to do or procure to be done to her no ill or damage of her body, annexes this qualification, aliter quàm ad virum suum ex causâ regiminis et *castigationis* uxoris suæ *licite rationabiliter pertinet* (*c*).

(*a*) 3 Atk. 548. (*b*) 13 East, 172, in notis. (*c*) Fitz. N. B. 80, F. and see 1 Stra. 478.

WIFE'S REMEDIES AFTER SEPARATION AGAINST HER HUSBAND'S MOLESTATION.

Reasoning then upon the effect of this proviso, if the case made by the articles amounted to no more than occasional restraint, or moderate correction, which might be necessary, it may be presumed, that it would be difficult to induce a Court of Law or Equity to interfere under such circumstances.

Habeas corpus.

The last and greatest remedy which the law has extended to a married woman living apart from her husband in consequence of their mutual agreement, is that of the *habeas corpus*, the great bulwark of civil liberty. This writ is only necessary where the purpose has been executed, and the wife's liberty is at an end by her actual confinement. The principle upon which this writ has been granted to a married woman against her husband in abridgment of his marital rights has been already stated; and the cases in support of it only remain to be considered.

In *Listor*'s case, decided nearly a century ago (*a*), the husband, during separation from his wife by their mutual agreement, seized her by force and carried her home in order to compel her to live with him, contrary to the articles entered into upon their agreement to live apart. To regain her freedom the wife sued out a *habeas corpus;* and the Court of King's Bench gave her liberty, assigning the reason, viz. that she and her husband separated by consent and under articles to live apart.

The next case was the *King* v. *Mead* (*b*). There the husband covenanted never to disturb his wife, nor any person with whom she should live. The

(*a*) 8 Geo. I. See 1 Stra. 477. 13 East, 173, in notis.
(*b*) 1 Burr. 542.

separation took place, and he, in order to have an opportunity of seizing her by force, or for some bad purpose, sued out a *habeas corpus* to bring up her body. The Court held that the agreement was a *formal renunciation* by the husband of his marital right either to seize his wife, or to *force* her to live with him; that any attempt by him to seize her would be a breach of the peace; and that if such an attempt were made in her return home from the Court it would be a *contempt*, and the Court told her she was at liberty.

WIFE'S REMEDIES AFTER SEPARATION AGAINST HER HUSBAND'S MOLESTATION.

So also in the *King* v. *Winton* (*a*), the husband applied for a *habeas corpus* to bring up the body of his wife. Upon a question as to the validity of the return, *Buller*, J., expressed himself to the following effect: "If this case turn out upon further investigation to be like that in *Burrow*, I am strongly inclined to think this would be an answer to the writ."

A similar application was made by the husband for this writ in the *King* v. *Edgar* (*b*). The answer given upon the return of it was, that the wife being intitled to considerable property to her separate use, she and her husband agreed to live apart under articles of separation, by which, in consideration of £3000, he was to resign all interest in her property; but that he afterwards seized and confined her. *Lord Kenyon* said, that unless the wife had done something notoriously to destroy the articles, it was *settled* that the husband had *renounced* all right to her, that he had no claim after the articles of separation. The Court therefore told her that she was

(*a*) 5 Term Rep. 91. (*b*) Rep. B. R. Temp. Lord Hardwicke, by Ridgeway, 152, in notis.

HUSBAND'S RIGHT OF ACTION FOR CRIMINAL CONVERSATION WITH HIS WIFE AFTER SEPARATION.

at liberty, and if she were apprehensive of violence she might have an officer of the Court to protect her.

Connected with the principle of the last decisions the final consideration will be,

VI. The effect of mutual separation upon the husband's right to maintain an action for criminal conversation with his wife during the period of their living apart.

Actions of this description are founded in the injury which the husband has sustained in the deprivation of the comfort, society, and assistance of his wife. This is the principle. The municipal law disregards the crime, leaving the punishment of the offence to the feeble jurisdiction of the Ecclesiastical tribunal. Courts of Common Law merely take cognizance of this subject as a civil injury to be compensated by damages. The loss of the comfort, society, and assistance of the wife is that injury, and that allegation is always contained in declarations at law as material and substantial. This practice is evidence of the ground upon which the law permits such actions to be maintained. The above principle, then, being the gist and foundation of those actions, the consequence must be, that when the husband voluntarily relinquishes the comfort, society, and assistance of his wife by consenting to a separation from her, he can suffer no loss from her incontinency whilst such separation continues; and so it was ruled by *Lord Kenyon* at *Nisi Prius* in *Weedon* v. *Timbrell*, and his opinion was afterwards confirmed by the Court of *King's Bench* upon argument as to the propriety of granting a new trial (*a*).

(*a*) 5 Term Rep. 357.

That case was alluded to in *Chambers* v. *Caulfield* (*a*), and nothing fell from the Court to shake its validity.

HUSBAND'S RIGHT OF ACTION FOR CRIMINAL CONVERSATION WITH HIS WIFE AFTER SEPARATION.

But the case of *Chambers* v. *Caulfield* establishes this proposition, that the surrender by the husband of his marital rights to the comfort, society, and assistance of his wife, under the instrument of separation, must be complete and absolute; so that if the husband *reserve* his wife's assistance for the benefit of their infant children, and she is to have liberty to visit his house as often as she pleases, to afford them all necessary care and attention, in such and the like instances the husband may maintain an action for criminal intercourse with her during the separation, upon the principle that he had *not* in fact *wholly* parted with the comfort, society, and *assistance* of his wife.

(*a*) 6 East, 244, 256.

APPENDIX.

No. I.

Power of Leasing contained in a Settlement (*a*).

PROVIDED also, and it is hereby agreed and declared, between and by the parties to these presents, that it shall and may be lawful to and for the said *E*, *H*, and *G* (his intended wife), as and when by virtue of the limitations hereinbefore contained, they shall successively and respectively be in the actual possession of, and entitled to the receipt of the rents, issues, and profits of the said manors, and other hereditaments hereby granted and released, or expressed and intended so to be, during their respective lives; and also to and for the said *C* and *D*, and the survivor of them, and the executors or administrators of such survivor, from time to time, and at all times during the minority of any child or children who by virtue of any of the limitations aforesaid shall be entitled to any estate of freehold and inheritance of and in the said manors and other hereditaments, by any indenture or indentures to be sealed and delivered by them respectively, in the presence of and attested by two or more credible witnesses, to limit or appoint, by way of demise or lease, all or any part or parts of the said manors and other hereditaments, with the appurtenances, to any person or persons, for any term or number of years absolute, not exceeding twenty-one years, to take effect in possession, and not in reversion by way of future interest, so as there be reserved on every such limitation or appointment, by way of demise or lease, the best or most

POWER.

To the husband and wife respectively, when in possession: and after their deaths, to other persons, (usually the releasees to uses, and the trustees to preserve the contingent remainders) during the minorities of tenants in tail by purchase.

By indenture, to be sealed, and delivered, and attested by two witnesses.

To grant leases for any term not exceeding twenty-one years, in possession, not in reversion.

(*a*) Vide Vol. I. p. 115.

Leasing power.

At the best rent, without fine, with condition of re-entry.

improved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be limited or appointed, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift, or any thing in the nature of a fine, premium, or foregift, for the making thereof; and so as there be contained in every such limitation or appointment, by way of demise or lease, a condition of re-entry for non-payment of the rent or rents thereby to be respectively reserved; and so as the appointee or appointees, lessee or lessees, do execute a counterpart thereof respectively, and do thereby covenant for the due payment of the rent or rents thereby to be respectively reserved, and be not by any clause or words therein to be contained made dispunishable for waste, or exempted from punishment for committing waste, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding.

Counterpart lease to be executed by lessee, with covenant to pay rent.

Lessee not to be dispunishable for waste.

No. II.

Lease by Husband and Wife under the Power of leasing, No. I. (*a*).

THIS INDENTURE made, &c. between *E H*, of , and *G*, his wife, of the one part, and *C B*, of , of the other part, WITNESSETH, that pursuant to, and by force and virtue, and in exercise and execution of a power or authority to them, the said *E H*, and *G*, his wife, for this purpose given or limited, in and by a certain indenture of release, bearing date the day of , grounded on a lease for a year, bearing date the day next before the day of the date thereof, the release being made, or expressed to be made, between the said *E H* of the first part, the said *G H* (then *G P*, spinster) of the second part, and *C* and *D* of the third part (being the settlement made previously to, and in contemplation of, the marriage then intended, and which was shortly afterwards duly had and solemnized between the said *E H* and *G*, now his wife), and of every or any other power or authority, in anywise enabling them in this behalf, and for and in consideration of the rents, covenants, and agreements hereinafter reserved and contained, on the part and behalf of the said *C B*, his executors, administrators, and assigns, to be paid, observed, and performed; they the said *E H*, and *G*, his wife, DO, by this indenture, sealed and delivered by them respectively, in the presence of, and attested by, the two credible persons whose names are intended to be hereupon indorsed as witnesses to the sealing and delivery of these presents by the said *E H* and *G H*, limit, appoint, and demise unto the said *C B*, his executors, administrators, and assigns, ALL THAT, &c. (the parcels) together with all and singular houses, outhouses, edifices, buildings, barns, stables, coachhouses, cottages, yards, gardens, orchards, backsides, lofts, lands, meadows, pastures, commons, common

Parties.

WITNESSETH that pursuant to the power,

and in consideration of the rent and covenants,

husband and wife,

limit, appoint, and demise to the lessee the parcels, and general words.

(*a*) Vide Vol. I. p. 115.

Lease under the preceding power.

of pasture, common of turbary, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the said messuage or farm-house, lands, hereditaments and premises belonging, or in anywise appertaining, or with the same, or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or any part of them, or appurtenant thereunto, with

HABENDUM. their and every of their appurtenances, TO HAVE AND TO HOLD the said messuage or farm-house, pieces or parcels of land, and all and singular other the premises hereinbefore limited, appointed, and demised, or expressed and intended so to be, with the appurtenances, unto the said *C B*, his executors, administrators, and assigns, for the term of twenty-one years, to be computed from the day of, &c. now last past, and thenceforth next ensuing, and fully to be complete and ended, YIELDING AND PAYING yearly, and every year during the said term, unto the person or persons for the time being entitled to the said premises in reversion or remainder immediately expectant, on the said term of twenty-one years, the yearly rent or sum of £875 of lawful money of *Great Britain*, by equal quarterly payments, on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th day of *December* in every year, without any deduction or abatement whatsoever for or in respect of the land-tax, or any other present or future taxes, or any other matter or thing whatsoever; the first quarterly payment of the said yearly rent to be made on the 25th day of *March* next ensuing the day of the date of these presents: PROVIDED ALWAYS nevertheless, and these presents are upon this express condition, that if the said yearly rent or sum of £875 hereinbefore reserved, or any part thereof, shall be in arrear after the same ought to be paid as aforesaid, or if the said *C B*, his executors, administrators, or assigns, shall at any time or times, during the continuance of this demise, transfer or assign over, or under-let, or agree to transfer or assign over, or under-let, to any person or persons whom-

For the term of twenty-one years in possession,

at the yearly rent of 875*l.* to be paid quarterly, without deduction.

PROVISO for RE-ENTRY,

on non-payment of rent,

or by lessee's assignment, without consent,

soever, the premises hereinbefore limited, appointed, or demised, or any part or parts thereof, for all or any part of the said term, without the licence and consent in writing of the person or persons for the time being entitled as aforesaid for that purpose first had and obtained; or if the said *C B*, his executors, administrators, or assigns, shall become bankrupt or shall compound his or their debts, or assign over his or their estate and effects for payment thereof, or if any execution shall issue against him or them or any of his or their effects whatsoever, whereupon the said premises, or any part thereof, shall be taken or attempted to be taken in execution; or if the said *C B*, his executors, administrators, or assigns, shall not from time to time, and at all times during the continuance of this demise, well and truly observe, perform, fulfil, and keep all and singular the covenants, conditions, and agreements which on his and their part are and ought to be observed, performed, fulfilled, and kept, according to the true intent and meaning of these presents; then and in any of the said cases it shall and may be lawful to and for the person or persons for the time being entitled as aforesaid into and upon the said appointed and demised premises, or any part thereof, in the name of the whole, to enter, and the same to have, retain, possess, and enjoy, discharged from these presents, and the limitation, appointment, and demise intended to be hereby made as aforesaid, any thing herein contained to the contrary thereof in any wise notwithstanding; AND the said *C B* doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with, and to the person or persons for the time being intitled as aforesaid, in manner following: that is to say, that he, the said *C B*, his executors, administrators, and assigns, shall and will well and truly pay, or cause to be paid unto the person or persons for the time being intitled as aforesaid, the aforesaid yearly rent of £875 on such days or times as are hereinbefore mentioned and appointed for the payment thereof; AND ALSO shall and will well and truly pay, bear, and discharge the land-tax, and all other taxes, charges, rates, duties, and assessments whatsoever, either already taxed, charged, rated, assessed, or imposed, or at any time or times hereafter during the continuance of this demise to be taxed,

Lease under the preceding power.

or by lessee becoming bankrupt, or compounding debts, or assigning estate for payment of debts, or by execution issuing against effects, whereupon premises are taken in execution, or on breach of any covenants by lessee.

COVENANTS BY LESSEE

for payment of rent,

and taxes,

Lease under the preceding power.

charged, rated, assessed, or imposed upon the said yearly rent of £875 upon the said premises hereinbefore limited, appointed, and demised, or any of them, or any part or parts thereof, or upon the person or persons for the time being entitled as aforesaid in respect thereof, as landlord or landlords of the same premises by authority of parliament or otherwise howsoever; AND ALSO shall and will, at and his and their own costs and charges, well and substantially uphold, repair, support, maintain, sustain, and amend the said messuage or farm-house, and all the barns, stables, and out-buildings thereunto belonging, and all the glass windows, glazing and lead work of the same messuage, or farm-house, and premises; and all locks, keys, hinges, bolts, bars, fixtures, pumps, and the going gears thereof; and all gates, stiles, pales, posts, baltons, bridges, hedges, ditches, drains, watercourses, and inward and outward fences of every kind, of or belonging to the said premises hereinbefore limited, appointed, and demised, or any part or parts thereof, at all times during the continuance of this demise, when need and occasion shall be or require, sufficient timber and fencing stuff being found by the person or persons for the time being entitled as aforesaid, within a reasonable distance from the place or places where the same shall be required to be used, such timber and fencing stuff to be cut and carried at the expense of the said *C B*, his executors, administrators, or assigns; AND the same messuage, or farm-house, articles, things, and premises, being so well and sufficiently upholden, repaired, supported, maintained, sustained, and amended, shall and will peaceably and quietly leave, surrender, and yield up unto the person or persons entitled to the said premises, at the end of, or sooner determination of the said term, together with such fixtures, materials, and things as are now, or shall at any time or times during the continuance of this demise, be set up and affixed within, upon, or about the said premises hereinbefore limited, appointed, and demised, or any part or parts thereof, (reasonable use or uses thereof, and accident by fire only excepted); AND ALSO that the said *C B*, his executors, administrators, or assigns, or any of them, shall not, nor will at any time or times during the continuance of this demise, transfer, assign over, or under-let to any person or persons whomsoever, the said pre-

and to repair the houses, and all windows, and lead-work of the premises, and all locks, &c. during the term.

sufficient allowance of timber being made to him,

and so to leave the same at the end of the term, together with fixtures;

not to assign or under-let the premises without consent.

mises hereinbefore demised, or any part or parts thereof, for all or any part of the said term of years, without the licence or consent in writing of the person or persons for the time being entitled as aforesaid for that purpose first had and obtained; AND ALSO that he, the said *C B*, his executors, administrators, and assigns, shall not, nor will at any time or times during the continuance of this demise, plough, dig, break, or convert into tillage or garden ground, any of the fields, closes, pieces or parcels of meadow, pasture, and marsh lands hereinbefore limited, appointed, and demised, or any part thereof respectively; AND ALSO shall not, nor will during the continuance of this demise, mow, or cause or suffer to be mowed, the fields, closes, pieces or parcels of land hereinbefore demised, or any of them, or any part thereof respectively, more than once in a year during the three last years of this demise, nor permit or suffer the same, or any part thereof respectively, to be injured or damaged by heavy cattle during the continuance of this demise; AND ALSO shall and will so manage and cultivate the arable lands, (parcel of the said premises hereinbefore limited, appointed, and demised) at all times during the continuance of this demise, that no more than two successive crops of corn, pulse, or grain, and those two not of the same kind, shall be had or taken from off the same, or any part or parts thereof, without giving the same a clear summer fallow, or sowing the same with turnips in the ensuing year, and with the next crop after such turnips, laying down the same land in an husband-like manner, with a sufficient quantity of sound clover and other grass seeds, and continuing the same so laid down two years, to be computed from the *Midsummer* day next after sowing the same seeds; AND ALSO shall and will yearly, and every year during the said term, inbarn or stock on the said premises, all the corn and grain which shall grow or arise therefrom, and there thrash the same, and feed and fodder cattle, or otherwise spend or consume on the said premises all the straw, colder, chaff, and clover arising therefrom, and also all the hay and turnips that shall grow or arise from or upon the said premises hereinbefore demised, except the winter corn straw that shall be wanted for thatching and daubing work; also except half the hay and clover which shall arise in the last year of this demise, and the

Lease under the preceding power.

And not to plough up any of the fields;

and not to mow the lands oftener than once a year in the latter years, nor suffer the same to be injured by cattle during the term.

Not to take more than two successive crops, and those two not of the same kind,

and to inn the corn upon the premises,

and to use the straw, &c. there,

with exceptions.

Lease under the preceding power.

Landlord and succeeding tenant to have an option to purchase the hay left on the premises, at a valuation.

whole of the straw, chaff, and colder arising from the corn in the said last year, which half of the hay, and the entirety of which straw, chaff, and colder shall be left upon the said premises for the benefit of the person or persons for the time being entitled as aforesaid, or his, her, or their succeeding tenant or tenants of the said premises; which hay, however, is to be so left upon the premises only for the purpose of giving an option to such person or persons, his, her, or their succeeding tenant or tenants so becoming the purchaser or purchasers thereof at so much money as the same shall be reasonably worth in the judgment of two judicious persons, one of them to be chosen by the said *C B*, his executors, administrators, and assigns, and the other of them to be chosen by the person or persons taking the same; and in case such two persons so chosen shall disagree as to the amount of such valuation, then the same shall be referred to the valuation of a third judicious person, to be chosen by the two first chosen, and the valuation to be made shall be binding and conclusive upon all the said parties;

Also to spend all the dung made during the term on the premises,

AND ALSO shall and will spend and lay in an husband-like manner, where the same shall be most wanted, all and every the dung, manure, muck, and compost that shall arise and be made during the continuance of this demise, from the hay, straw, and clover, colder, tares, vetches, and turnips that shall be so spent and consumed on the said premises as aforesaid, except the dung, manure, and compost that shall arise and be made therefrom in the last year of this demise, and during the time that shall elapse between the end of this demise, and the first day of *May* then next ensuing, and shall and will turn in heaps, and leave in the yards, or some other convenient part of the said premises hereinbefore limited, appointed, and demised,

and so leave the same.

the dung, manure, muck, and compost so excepted as aforesaid, except such part thereof as shall be used for preparing turnips for the benefit of the person or persons for the time being entitled as aforesaid, or his or their succeeding tenant or tenants of the same premises, without any allowance being made to him or them in respect of the same; AND ALSO that he, the said *C B*, his executors, administrators, or assigns, shall

Also to scour ditches, and cut fences.

and will yearly, and every year during the continuance of this demise, in an husband-like manner, cut, scour, or cause and

procure to be cut and scoured yards of the fences and ditches upon such part of the arable land hereinbefore limited, appointed, and demised; and roods of the fences and ditches upon such part of the marsh lands as shall most require cutting and scouring, and do, or cause to be done, all such outhawking, banking, and planting necessary for that purpose, being allowed bushes, thorns, and other fencing, sufficient, to be taken from the premises; AND the said *E H* doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, with and to the said *C B*, his executors, administrators, and assigns, that he, the said *C B*, his executors, administrators, and assigns, paying the said yearly rent of £875, hereinbefore reserved, as the same shall become due and payable in manner and form aforesaid, and well and truly observing, performing, fulfilling, and keeping all and singular the covenants and agreements hereinbefore contained, on his and their parts, to be observed, performed, fulfilled, and kept according to the true intent and meaning of these presents, shall or lawfully may, peaceably and quietly have, hold, use, occupy, possess, and enjoy all and singular the said messuage or farm-house, and other premises hereinbefore limited, appointed, and demised, or expressed and intended so to be, with their appurtenances, during the said term of 21 years, without the lawful let, suit, trouble, or hindrance of or by the person or persons for the time being entitled as aforesaid, or any person or persons whomsoever lawfully claiming or to claim by, from, under, or in trust for such person or persons, or any of them. IN WITNESS, &c.

Lease under the preceding power.

Covenant by husband with lessee for quiet enjoyment.

No. III.

A Mortgage in fee of the Wife's Estate (*a*).

Parties.

THIS INDENTURE made, &c. between *A B*, of and *C* his wife, of the one part, and *E F*, of of the other part:

RECITALS.

Recites the seisin in fee of the wife or the husband in her right.

WHEREAS the said *C B*, or the said *A B* in her right, is seised or entitled for an estate of inheritance in fee simple in possession of, or to the lands and other hereditaments hereinafter particularly described, and intended to be hereby granted and released with their appurtenances:

The application for loan, and the agreement of the mortgagee to lend.

AND WHEREAS the said *A B* having occasion for the sum of £1000, hath applied to the said *E F* to advance and lend him the same, which he the said *E F* hath agreed to do, upon having the repayment thereof, with interest, after the rate of £5 per cent. per annum, secured to him in the manner hereinafter mentioned:

WITNESSETH,

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in consideration of the sum of £1000 of lawful money of Great Britain, at or immediately before the sealing and delivery of these presents in hand well and truly paid by the said *E F* to the said *A B*, with the privity and approbation of the said *C*, his wife, (testified by her being a party to and sealing and delivering of these presents) the receipt and payment of which said sum of £1000 they the said *A B*, and *C* his wife, do and each of them doth hereby admit and acknowledge, and of and from the same and every part thereof do, and each of them doth acquit, release, and discharge the said *E F*, his heirs, executors, and administrators for ever by these presents:

The consideration.

Grant and release by husband and wife to mortgagee.

They the said *A B*, and *C* his wife, HAVE, and each of them HATH, granted, bargained, sold, released, and confirmed, and by these presents DO and each of them DOTH grant, bargain, sell, release, and confirm unto the said *E F* (in his actual possession now being by virtue of a bargain and sale to him thereof made by the said *A B*, and

Reference to lease for a year.

(*a*) Vide Vol. I. p. 158.

C his wife, in consideration of 5*s*. a piece, by an indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession) and to his heirs and assigns: ALL those pieces or parcels of land, &c. (the parcels): AND all mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the said pieces or parcels of land, hereditaments, and premises belonging, or in any wise appertaining, or with the same, or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or any of them, or appurtenant thereunto, with their and every of their appurtenances; and the reversion and reversions, remainder and remainders, yearly, and other rents, issues, and profits of all and singular the said pieces or parcels of land, hereditaments, and premises hereby granted and released, or intended so to be: AND all the estate, right, title, interest, inheritance, reversion, use, trust, property, claim, and demand whatsoever, both at law and in equity of them the said *A B*, and *C* his wife, or either of them, of, in, and to the same premises, and every part and parcel thereof: TO HAVE AND TO HOLD the said lands, hereditaments, and all and singular other the premises hereinbefore granted and released, or expressed and intended so to be, with their appurtenances, unto the said *E F*, his heirs and assigns, to the use of the said *E F*, his heirs, and assigns for ever: Subject nevertheless, to the proviso or condition, covenant, and agreement hereinafter contained for redemption of the same premises: AND for the considerations aforesaid, and for more effectually conveying and assuring the said lands, hereditaments, and premises hereinbefore granted and released, or expressed and intended so to be, he the said *A B* doth hereby for himself, and for the said *C* his wife, her heirs, executors, and administrators, covenant, promise, and agree with and to

Mortgage of the wife's estate.

The parcels.

General words.

HABENDUM.

To the use of the mortgagee in fee.

Subject to redemption.

Covenant by the husband that his wife shall join him in levying a fine.

Mortgage of the wife's estate.

the said *E F*, his heirs, executors, administrators, and assigns, that they the said *A B*, and *C* his wife (she hereby consenting thereto), shall and will, at the costs and charges of the said *A B* as of *Michaelmas* term last, or before the end of *Hilary* term now next ensuing, acknowledge and levy before his Majesty's justices of the court of *Common Pleas* at *Westminster*, unto the said *E F*, and his assigns, *a fine sur conuzance de droit come ceo*, &c. whereupon proclamations shall be had and made according to the statute in that case made and provided, and the usual course, order, and manner of fines for assurance of lands in like cases, used and accustomed of all the said lands, hereditaments, and premises hereinbefore granted and released, or expressed and intended so to be, with their appurtenances, by such names, quantities, qualities, and descriptions, as shall be sufficient to ascertain and comprise the same: AND it is hereby agreed and declared between and by the parties to these presents, that the said fine so as aforesaid, or in any other manner or at any other time, to be acknowledged and levied, and all and every other fine and fines whatsoever, already acknowledged and levied, and hereafter to be acknowledged and levied of the said lands, hereditaments, and premises hereinbefore granted and released, or expressed and intended so to be, or any of them, or any part thereof, by or between the parties to these presents or any of them, or whereunto they or any of them are or shall be parties or privies, shall operate and enure, and be adjudged, deemed, construed, and taken to operate and enure, to the use of the said *E F*, his heirs and assigns for ever: BUT SUBJECT, nevertheless, to the proviso or condition, covenant and agreement hereinafter contained for redemption of the same premises: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, and the true intent and meaning of them and of these presents nevertheless, is that if the said *A B*, and *C* his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, shall and do, well and truly pay or cause to be paid to the said *E F*, his executors, administrators, or assigns, the sum of £1000 of lawful money of *Great Britain*, and the sum of £50 of like lawful money,

Declaration that the fine and all other fines by the said parties,

shall enure,

to the use of the mortgagee in fee,

subject to redemption.

Proviso for redemption.

as and for one year's interest of the same, at the rate of £5 for £100 for a year, making together the sum of £1050, in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned (that is to say), the sum of £25, part thereof (being half a year's interest for the said sum of £1000 at the rate aforesaid), on the day of next ensuing the date of these presents, which will be in the year of our Lord 18 and the sum of £1025 residue thereof, being the whole of the said principal sum of £1000, and another half year's interest for the same at the rate aforesaid, on the day of then next following, which will be in the year 18 without any deduction or abatement whatsoever out of the same or any part thereof, for or in respect of any taxes, charges, rates, assessments, payments, or impositions taxed, charged, assessed, or imposed upon, or to be taxed, charged, assessed, or imposed upon the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, or any of them, or upon the said sum of £1050, or any part thereof, or upon the said *E F*, his heirs, executors, administrators, or assigns, for or on account or in respect of the said lands, hereditaments, and premises, or any of them, or of the said sum of £1050 or any part thereof, by authority of parliament or otherwise howsoever, or for upon account or in respect of any other matter, cause, or thing whatsoever: Then and in such case he the said *E F*, his heirs or assigns, shall and will, at any time after such payment shall be so made as aforesaid, upon the request and at the proper costs and charges of the said *A B*, and *C* or either of them, his or her heirs or assigns, reconvey the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, with their appurtenances, unto the said *C B*, her heirs and assigns, or as she or they, or other the person or persons for the time being intitled to the equity of redemption of and in the said mortgaged premises, shall in that behalf order or direct, free from all incumbrances whatsoever, made, done or committed by the said *E F*, his heirs, executors, administrators, or assigns, or any of them, so as for the doing thereof the said *E F*, his heirs, executors, ad-

Mortgage of the wife's estate.

Mortgage of the wife's estate.

ministrators, or assigns, or any of them, be not compelled or obliged to go or travel from the place or places of his, their, or any of their usual abode or dwelling. AND the said *A B* doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said *E F*, his executors, administrators, and assigns, that he the said *A B*, or the said *C B* his wife, or one of them, their or one of their heirs, executors, or administrators, shall and will well and truly pay or cause to be paid unto the said *E F*, his executors, administrators, or assigns, the aforesaid sum of £1050 in the parts, shares, or proportions, and on or at the days or times in the aforesaid proviso or agreement mentioned or appointed for payment thereof respectively, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents: AND the said *A B* doth for himself, his heirs, executors, and administrators covenant, promise, grant, and agree with and to the said *E F*, his heirs and assigns, by these presents in manner following, (that is to say), that he the said *A B*, and the said *C*, his wife, or one of them, now have or hath in themselves, himself, or herself, good right, full power, and lawful and absolute authority to grant, bargain, sell, release, and convey the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, with their appurtenances, unto, and to the use of the said *E F*, his heirs, and assigns, in manner aforesaid, according to the true intent and meaning of these presents; AND ALSO, that if default shall be made in payment of the said sum of £1050, or any part thereof, contrary to the aforesaid proviso or agreement for payment of the same, and the true intent and meaning of these presents, then and in such case it shall and may be lawful to and for the said *E F*, his heirs and assigns, at any time or times thereafter, into and upon all and every the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, or any of them, or any part or parts thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, and enjoy, and receive and take the rents, issues, and profits thereof, to and for his and their own use, without any let, trouble, interruption, or disturbance whatso-

Covenant by the husband to pay the mortgage money and interest according to the proviso for redemption,

that he and wife, or one of them, have or hath good right to convey, &c.

And that in default of payment of mortgage money, mortgagee may enter and enjoy, &c.

ever of, from, or by the said *A B*, and *C* his wife, or either of them, their or either of their heirs or assigns, or any other person or persons whomsoever, any estate, right, title, or interest, having or lawfully or equitably claiming, or to have or lawfully or equitably claim, in or to the said lands, hereditaments, and premises, or any of them, or any part or parts thereof; AND that free and clear, and freely and clearly, and absolutely acquitted, exonerated, and discharged, or otherwise, by the said *A B*, his heirs, executors, or administrators, saved, protected, kept harmless, and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, wills, intails, annuities, rent charges, rents seck, and arrears of rent, fines, issues, amerciaments, statutes, recognizances, judgments, executions, extents, seizures, sequestrations, and all other estates, titles, troubles, charges, and incumbrances whatsoever. AND MOREOVER, that if default shall be made of, or in payment of the aforesaid sum of £1050, or any part thereof, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, then and in such case he the said *A B*, and *C* his wife, and each of them, their, and each of their heirs, and all and every other persons and person whomsoever, having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, or interest of, in, or to the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will, from time to time, and at all times thereafter, upon the request of the said *E F*, his heirs or assigns, but at the costs and charges of the said *A B*, his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, matters, things, conveyances, and assurances in the law whatsoever for the further, better, more perfectly and absolutely granting, conveying, and assuring all the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, with their appurtenances, unto the said *E F*, his heirs and assigns, as by the said *E F*,

Mortgage of the wife's estate.

Free from incumbrances.

That husband and wife and all other persons lawfully or equitably claiming, will do all acts for further assurance.

Mortgage of the wife's estate.

his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required. PROVIDED ALSO, and it is hereby agreed and declared between and by the said parties to these presents, and the true intent and meaning of them and of these presents nevertheless further is, that it shall and may be lawful to and for the said *A B*, and *C* his wife, their heirs and assigns, or other the person or persons for the time being entitled to the equity of redemption of or in the said mortgaged premises, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof to his and their own use and benefit, until default shall be made in payment of the said sum of £1050, or some part thereof, contrary to the aforesaid proviso or covenant for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever of, from, or by the said *E F*, his heirs or assigns, or by any other person or persons whomsoever, lawfully claiming or to claim by, from, or under him, them, or any of them. IN WITNESS, &c.

Agreement that the mortgagors shall enjoy until default in payment of mortgage money and interest, according to the proviso for redemption.

No. IV.

Further Charge on the Hereditaments comprised in last Precedent by Indorsement thereon (*a*).

THIS INDENTURE made, &c. between the within named *A B*, and the within named *C*, his wife, of the one part, and the within named *E F*, of the other part: WHEREAS default was made in payment of the within mentioned sum of £1050 at the time in the within written indenture mentioned or appointed for payment thereof; and the whole of the within mentioned principal sum of £1000 still remains due and owing on the security of the within written indenture, but all interest for the same hath been duly paid up to the day of the date of these presents, as the said *E F* doth hereby admit and acknowledge. AND WHEREAS the said *A B* having occasion for the further sum of £600, hath applied to and requested the said *E F* to advance and lend him the same, which he the said *E F* hath agreed to do, upon having the same sum of £600, with interest for the same, after the rate of £5 per cent. per annum, secured in manner hereinafter mentioned. AND WHEREAS, in pursuance of the said agreement in this behalf, he the said *E F* hath this day paid to the said *A B* the said sum of £600, with the privity and approbation of the said *C B*, (testified by her being a party to and sealing and delivering these presents), as they the said *A B*, and *C* his wife, do hereby admit and acknowledge. NOW THIS INDENTURE WITNESSETH, that in consideration of the premises, he the said *A B* doth hereby for himself, his heirs, executors, and administrators covenant, promise, and agree with and to the said *E F*, his executors, administrators, and assigns, that he the said *A B*, and *C* his wife, or one of them, their or one of their heirs, executors, administrators, or assigns, shall and will, on or before the day of now next ensuing, well and truly pay or cause to be paid to

Parties.

Recites, default made in payment of the money secured by within indenture.

That principal money thereby secured was still due, but all interest paid.

Application for further loan.

Agreement to lend.

Payment of money agreed to be lent.

Acknowledgment of such payment by husband and wife.

First operative part.

(*a*) Vide Vol. I. p. 158.

Further charge.

the said *E F*, his executors, administrators, or assigns, the said sum of £600, with interest for the same after the rate of £5 for £100 by the year, free from all deductions or abatements whatsoever. AND THIS INDENTURE ALSO WITNESSETH, that for the considerations aforesaid, and for further securing the said sum of £600 and interest, He the said *A B* doth hereby for himself, and for the said *C* his wife, her heirs, executors, and administrators, covenant, promise, and agree with and to the said *E F*, his heirs, executors, administrators, and assigns, that they the said *A B*, and *C* his wife, (she hereby consenting thereto) shall and will at the costs and charges of the said *A B*, as of *Michaelmas* Term last, or before the end of *Hilary* Term now next ensuing, acknowledge and levy before his majesty's justices of his Court of *Common Pleas*, at *Westminster*, unto the said *E F*, and his heirs, *a fine sur conuzance de droit come ceo*, &c., whereupon proclamations shall be had and made according to the form of the statute in that case made and provided, and the usual course, order, and manner of fines for assurance of lands in like cases used and accustomed, of all the within mentioned lands and other hereditaments, with their appurtenances, by such names, quantities, qualities, and descriptions as shall be sufficient to ascertain and comprise the same. AND it is hereby agreed and declared, between and by the parties to these presents, that the said fine so as aforesaid, or in any other manner or at any other time to be acknowledged and levied, and all and every other fine and fines whatsoever already acknowledged and levied of the said lands, hereditaments, and premises, or any of them, or any part thereof, by or between the parties to these presents, or any of them, or whereunto they or any of them shall be parties or privies, shall operate and enure, and be adjudged, deemed, construed, and taken to operate and enure, TO THE USE AND INTENT that the said lands and other hereditaments shall henceforth stand and be charged and chargeable with the payment, as well of the said sum of £600, and interest for the same, after the rate aforesaid, as of the said sum of £1000 and interest. And that the said lands and other hereditaments, or any of them, or any part thereof, shall not be redeemed or redeemable until payment as well of the said sum of £600,

Second operative part.

Covenant by husband that wife shall join him in levying a fine.

Declaration that the fine and all other fines by the same parties

shall enure to the use and intent that the hereditaments shall stand charged with the payment of the further loan and interest as well as the first.

and interest for the same after the rate aforesaid, as of the said sum of £1000, and interest intended to be secured by the within written indenture, and the lease for a year upon which the same is grounded. AND the said *A B* doth hereby for himself, his heirs, executors, and administrators, covenant, grant, and agree with and to the said *E F*, his heirs, executors, administrators and assigns, in manner following (that is to say), that they the said *A B*, and *C* his wife, or one of them, now have or hath in themselves, himself or herself, good, right, full power, and lawful and absolute authority to charge, and make chargeable the said lands and other hereditaments hereinbefore charged and made chargeable in manner aforesaid, according to the true intent and meaning of these presents: AND FURTHER, that they the said *A B*, and *C* his wife, and each of them, their and each of their heirs, and all and every other persons and person whomsoever, having or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, or interest, of, in, or to the said lands and other hereditaments hereinbefore charged and made chargeable, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will, from time to time, and at all times hereafter, upon the request of the said *E F*, his heirs, executors, administrators, or assigns, but at the costs and charges of the said *A B*, his heirs, executors or administrators, make, do, and execute, or cause and procure to be made, done, and executed all and every such further and other reasonable acts, deeds, and assurances in the law whatsoever, for the further and more effectually charging and making chargeable all the said lands and other hereditaments hereinbefore charged and made chargeable, or expressed and intended so to be, with their appurtenances, as by the said *E F*, his heirs, executors, administrators, or assigns, or his or their counsel learned in the law, shall be reasonably advised or devised and required. IN WITNESS, &c.

Further charge.

Covenants by husband, that he and his wife, or one of them, had good right to charge.

And that they and all other persons claiming any interest in the hereditaments shall do all acts for better charging which shall be required by the mortgagee or his counsel.

No. V.

Assignment of the Wife's Term for Years by the Husband (*a*).

Parties.

THIS INDENTURE made the day of , &c.: Between *A B*, of and *F* his wife (*b*), (before her marriage *F T*, spinster) of the one part, and *C D* of of the other part: WHEREAS by an indenture bearing date the day of and made, or expressed to be made between *J H* of the one part, and the said *F B* (then *F T*, spinster) of the other part: For the considerations therein mentioned, the said *J H* did demise and lease unto the said *F B*, her executors, administrators, and assigns, ALL THAT messuage, &c. with the appurtenances; to hold the same unto the said *F B*, her executors, administrators, and assigns, from the day of then last past, for and during the full end and term of 99 years, from thence next ensuing, and fully to be complete and ended, at, under, and subject to the rent, covenants, and agreements therein reserved and contained on the part of the said *F B*, her executors, administrators, and assigns, to be paid, observed, performed, and kept: AND WHEREAS the said *A B*, with the privity and approbation of the said *F*, his wife, hath contracted and agreed with the said *C D* for the absolute sale to him, the said *C D*, of the said messuage or tenement, and all and singular other the premises comprised in the aforesaid in part recited indenture of lease for the residue now to come and unexpired of the said term of 99 years, at or for the price or sum of £ : NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in consideration of the sum of £ of lawful money of *Great Britain* to the said *A B* in hand well and truly paid by the said *C D* at or before

Recites, the wife's title to the term,

and the contract by the husband for the sale of the term.

The consideration.

(*a*) Vide Vol. I. p. 169.

(*b*) Although an assignment by the husband *alone* for a valuable consideration would be sufficient, yet as the most usual practice is to make the wife join with the husband, this precedent is so framed.

the sealing and delivery of these presents, (the receipt whereof he the said *A B* doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said *C D*, his heirs, executors, administrators, and assigns for ever, by these presents), AND ALSO for and in consideration of the sum of ten shillings of like lawful money to the said *F B* in hand well and truly paid by the said *C D* at or immediately before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged): He the said *A B*, with the privity and approbation of the said *F* his wife, (testified by her being a party to and sealing and delivering these presents), and also the said *F B* HAVE, and each of them HATH bargained, sold, assigned, transferred, and set over, and by these presents DO and each of them DOTH bargain, &c. unto the said *C D*, his executors, administrators, and assigns, the said messuage or tenement, and all and singular other the premises comprised in and demised by the said in part recited indenture, with their and every of their appurtenances, together with the said in part recited indenture and the full benefit thereof: AND all the estate, right, title, interest, term and terms for years, property, possibility, claim, and demand whatsoever both at law and in equity of them, the said *A B*, and *F* his wife, or either of them, of, in, to, or out of the same premises, or any part thereof: TO HAVE AND TO HOLD the said messuage or tenement, and all and singular other the premises hereby assigned, or expressed and intended so to be, with their appurtenances, unto the said *C D*, his executors, administrators, and assigns, for and during all the residue and remainder now to come and unexpired of the said term of 99 years, subject nevertheless to the payment of the rent, and to the performance and observance of the covenants and agreements in the said in part recited indenture reserved and contained, and which from henceforth on the lessees' or assignees' part and behalf are and ought to be paid, observed, and performed (*a*): AND the said *A B* for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said *C D*, his executors, administrators, and assigns, by these presents in manner fol-

Assignment of wife's term for years.

The assignment.

HABENDUM.

COVENANTS by the husband, that he and his wife, or one of them, had good right to assign.

(*a*) See *Staines* v. *Morris*, 1 *Ves.* and *Bea.* 8.

Assignment of wife's term for years.

lowing, (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever by him the said *A B*, or the said *F* his wife, made, done, committed, or executed, or knowingly or willingly suffered to the contrary, the hereinbefore in part recited indenture of lease at the time of the sealing and delivery of these presents is a good and effectual lease and demise in the law of the said premises therein comprised, and the said term of 99 years is not forfeited, merged, extinguished, surrendered, determined, or otherwise become void or voidable: AND that for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid, he the said *A B*, and the said *F* his wife, or one of them, now have or hath in themselves, himself or herself, good right, full power, and lawful and absolute authority to assign the premises hereby assigned, or expressed and intended so to be, with the appurtenances thereunto belonging, unto the said *C D*, his executors, administrators, and assigns, for all the residue now to come of the said term of 99 years in manner aforesaid, according to the true intent and meaning of these presents: AND that it shall and may be lawful to and for the said *C D*, his executors, administrators, and assigns, from time to time and at all times hereafter during the said term of 99 years, peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy the premises hereby assigned or expressed and intended so to be, with their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever of or by him the said *A B*, and the said *F* his wife, or either of them, their or either of their executors or administrators, or by any other person or persons lawfully or equitably claiming or to claim by, from, or under or in trust for them or any of them; AND that free and clear and for ever discharged or otherwise by the said *A B*, his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made,

For quiet enjoyment,

executed, occasioned, or suffered by the said *A B*, and *F* his wife, or either of them, their or either of their executors or administrators, or by any person or persons lawfully or equitably claiming or to claim by, from, under or in trust for them or any of them: AND FURTHER, that he the said *A B*, his executors and administrators, and all and every other persons or person having or claiming, or who shall or may have or claim any estate, right, title, interest, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said premises hereby assigned, or expressed and intended so to be, or any of them or any part thereof respectively by, from, or under or in trust for him the said *A B*, and *F* his wife, or either of them, their or either of their executors or administrators, shall and will from time to time and at all times hereafter during the said term of 99 years upon every reasonable request to be made for that purpose by and at the proper costs and charges in the law of the said *C D*, his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed all and every such further and other lawful and reasonable acts, deeds, things, devices, assignments, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely assigning and assuring of the premises hereby assigned, or expressed and intended so to be, and every part thereof, with their appurtenances, unto the said *C D*, his executors, administrators, and assigns, for the residue which shall be then to come of the said term of 99 years, as by the said *C D*, his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably devised or advised and required: AND ALSO that he the said *A B*, his executors or administrators, shall and will pay the rent reserved by the aforesaid in part recited indenture of lease, up to and including *Midsummer* day now next ensuing, and shall and will keep indemnified the said *C D*, his executors, administrators, and assigns, and his and their lands, tenements, goods, and chattels respectively from the same rent, and from all costs and expenses on account of the non-payment thereof, or on account of the breach or non-performance of any of the covenants or agreements in the said in part recited indenture on the part of the said *F B*, her exc-

Assignment of wife's term for years.

For further assurance,

and for payment of rent and performance of covenants up to a given time.

Assignment of wife's term for years.

cutors, administrators, or assigns, to be performed from the commencement thereof: AND the said *C D* doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said *A B*, his executors, administrators, and assigns, that he the said *C D*, his executors, administrators, and assigns, shall and will at all times during the continuance of the said term of 99 years pay the yearly rent reserved by the aforesaid in part recited indenture of lease from *Midsummer* day now next ensuing, and perform, fulfil, and keep all and every the covenants and agreements in the said indenture of lease contained on the part of the tenant or lessee from henceforth to be performed, and from the same rent, covenants, and agreements, and all costs and expenses on account of any breach, neglect, or default of or in payment or performance thereof as aforesaid, shall and will save harmless and keep indemnified the said *A B*, and *F* his wife, and each of them, their and each of their executors and administrators, and their lands, tenements, goods, and chattels respectively. IN WITNESS, &c.

Covenant by assignee for payment of rent and performance of covenants after that time.

No. VI.

An Assignment by a Husband of his Wife's Choses in Action to a Purchaser (*a*).

THIS INDENTURE made, &c. between *A B* of , &c. and *C*, his wife (*b*), (before her marriage *C S*, spinster), of the one part, and *D F* of , &c. of the other part, Parties.

Recites a bond, whereby a sum of £1000 was secured to the wife before marriage; Recites the wife's title to her choses in action,

Also recites the will of *W S*, whereby an equal third part or share of residuary personal estate was bequeathed to the wife before marriage.

AND WHEREAS the said *A B*, with the privity and approbation of the said *C*, his wife, hath contracted and agreed with the said *D F* for the sale to him, the said *D F*, of the said bond or obligation as aforesaid, and all principal money and interest now or henceforth to become due thereon; and also of the said equal third part or share in and by the said will of the said *W S*, given or bequeathed to the said *C B* as aforesaid, of and in the residuary personal estate and effects of him the said *W S*, at or for the price or sum of £ : NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and for and in consideration of the sum of £ of lawful money, &c. to the said *A B*, &c. and for and in consideration of the sum of 10*s*., &c. to the said *C B*, &c., he, the said *A B*, with the privity and approbation of the said *C*, his wife (testified by her being a party to and executing these presents); and also the said *C B* HAVE, and each of them HATH bargained, sold, assigned, transferred, and set over, and by these presents DO, and each of them DOTH bargain, &c. unto the said *D F*, his executors, administrators, and assigns, ALL that the said sum of £1000, secured as herein- and the contract by the husband for the sale of them. The consideration. The assignment.

(*a*) Vide Vol. I. p. 234. (*b*) The same observation applies to this precedent with respect to the necessity of making the wife a party, as stated in note *b* to the preceding assignment.

Assignment of wife's choses in action.

before is mentioned, and all interest now due, and henceforth to grow due for the same, together with the said in part recited bond or obligation, and the full benefit thereof; AND ALSO all that the said equal third part or share to which she the said *C B* became entitled as hereinbefore is mentioned, of and in the residuary personal estate and effects of the said *W S*, AND all the right, title, interest, property, possibility, claim, and demand whatsoever, both at law and in equity, of them the said *A B*, and *C*, his wife, or either of them, of, in, or to the same premises respectively, or any part thereof respectively, WITH full power and authority to ask, sue for, recover and receive, and to give effectual receipts and discharges for the said principal monies, and interest, and premises hereinbefore assigned, and every or any part thereof respectively, in the names or name of the said *A B*, and *C*, his wife, or either of them:

HABENDUM. TO HAVE, HOLD, receive, take, and enjoy the said sum of £1000, and interest; AND the said equal third part or share, and premises hereinbefore assigned, or expressed and intended so to be, unto the said *D F*, his executors, administrators, and assigns, to and for his and their own use and benefit absolutely;

COVENANTS by the husband, that he and his wife, or one of them, had good right to assign, AND the said *A B* for himself, his heirs, executors, and administrators, doth covenant, promise, and agree with, and to the said *D F*, his executors, administrators, and assigns, by these presents, in manner following (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever by him, the said *A B*, or the said *C*, his wife, made, done, committed or executed, or knowingly or willingly suffered to the contrary, they, the said *A B*, and *C*, his wife, or one of them, now have or hath in themselves, himself or herself, good right, full power, and lawful and absolute authority to assign the premises hereby assigned or expressed and intended so to be, with the appurtenances thereunto belonging, unto the said *D F*, his executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents;

and for further assurance. AND FURTHER that he, the said *A B*, and *C*, his wife, their, and each of their executors and administrators, and all and every other persons or person having or claiming, or who shall, or may have, or claim any estate, right, title, interest, property, claim, or demand whatsoever, either at law or in

equity, of, in, to, or out of the said premises hereby assigned, or expressed and intended so to be, or any of them, or any part thereof respectively, by, from, or under, or in trust for him, the said *A B*, or the said *C*, his wife, or either of them, their, or either of their executors or administrators, shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose by and at the proper costs and charges in the law of the said *D F*, his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, assignments, and assurances in the law whatsoever for the further, better, more perfectly and absolutely assigning and assuring of the premises hereby assigned or expressed and intended so to be, and every part thereof, with their appurtenances, unto the said *D F*, his executors, administrators, and assigns, as by the said *D F*, his executors, administrators, or assigns, or his, or their counsel in the law shall be reasonably devised, or advised and required. IN WITNESS, &c.

Assignment of wife's choses in action.

No. VII.

A Settlement before Marriage of personal Property by the Husband on his intended Wife (*a*).

Parties.

THIS INDENTURE made, &c. between *A B* of , of the first part, *C D* of , spinster, of the second part, and *E F* of , and *G H* of , of the third part: WHEREAS a marriage hath been agreed upon, and is intended to be shortly had and solemnized between the said *A B* and *C D*: AND WHEREAS by an instrument or policy of assurance, bearing date the day of , and numbered , under the hands and seals of two of the trustees of the society for equitable assurance on lives and survivorships, the sum of £ is assured to be paid out of the stock or funds of the said society to the executors, administrators, or assigns of the said *A B* within six calendar months after the expiration of the first year of the time of the said assurance, in case the said *A B* shall die within such year; or if the said *A B* shall die after the expiration of such first year, then within six calendar months next after the proof of the death of the said *A B* shall be made according to the rules and practice of the said society, at and under the annual premium of £ : AND WHEREAS, upon the treaty for the said intended marriage, it was agreed that the said *A B* should transfer the sum of £2000 3 *per cent.* reduced bank annuities to the said *E F* and *G H*; and that the said *E F* and *G H*, their executors, administrators, and assigns, should stand, and be possessed of, and interested in the said sum of £2000 6 *per cent.* reduced bank annuities; and the said instrument or policy of assurance upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter declared or contained, of and concerning the same respectively: AND WHEREAS upon the treaty for the said marriage, and in consideration thereof, and of the settlement hereby

Recites the intended marriage, and a policy of assurance on the husband's life,

The husband's agreement to settle stock,

and the policy of assurance.

Also recites an agreement that all the then and future personal

(*a*) See Vol. I. p. 285.

intended to be made by the said *A B*, it was agreed between the said *A B* and *C D*, that all the personal estate to which the said *C D* now is, or to which she, or the said *A B* in her right, shall or may become entitled during the said intended coverture, shall, in case the said intended marriage shall take effect, become and be the absolute property of him the said *A B*: AND WHEREAS in pursuance and part performance of the aforesaid agreement in this behalf, the said *A B* hath this day transferred the sum of £2000 3 *per cent.* reduced bank annuities into the names of the said *E F* and *G H* in the books kept by the governor and company of the Bank of *England*, for entering transfers of the same stock: NOW THIS INDENTURE WITNESSETH, that in pursuance and further performance of the aforesaid agreement in this behalf, and in consideration of the said intended marriage, and for and in consideration of the sum of 10*s.* of lawful money of *Great Britain*, to the said *A B* paid by the said *E F* and *G H*, at or immediately before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), he the said *A B*, with the privity and approbation of the said *C D* (testified by her being a party to, and sealing and delivering these presents), HATH bargained, sold, assigned, transferred, and set over, and by these presents DOTH bargain, sell, assign, transfer, and set over unto the said *E F* and *G H*, ALL that the said instrument or policy of assurance, and the full benefit and advantage thereof, and all and every sums and sum of money to be had, or received, or become due or payable by virtue of the same; AND all the right, title, interest, property, possibility, claim, and demand whatsoever, both at law and in equity, of him the said *A B*, of, in, to, from, out of, or upon the same premises, and every of them, and every part thereof: TO HAVE, HOLD, receive and take the said instrument or policy of assurance, sums and sum of money, and all and singular other the premises hereinbefore assigned or expressed and intended so to be unto the said *E F* and *G H*, their executors, administrators and assigns, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations hereinafter declared or contained of and concerning the same; AND THIS INDENTURE ALSO WITNESSETH, that in pursuance and further

Settlement before marriage.

estate of wife should be the absolute property of husband;

and that the husband had transferred the stock into the names of the trustees.

THE ASSIGNMENT of

policy of assurance

to the trustees upon the trusts after declared.

Settlement before marriage.

performance of the said agreement, and in consideration of the said intended marriage, it is hereby agreed and declared between and by the parties to these presents, that the said *E F* and *G H*, their executors, administrators and assigns, shall stand and be possessed of, and interested in the said sum of £2000 3 *per cent.* reduced bank annuities, so this day transferred to them the said *E F* and *G H* as hereinbefore is mentioned, and of and in the dividends, interest and annual produce thereof, in trust for the said *A B*, his executors, administrators and assigns in the meantime, and until the said intended marriage shall be had and solemnized; and from and after the solemnization thereof, upon trust, that they the said *E F* and *G H*, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall either permit and suffer the said sum of £2000 3 *per cent.* reduced bank annuities to remain in their actual state of investment, or do and shall at any time or times (with the consent in writing of the said *A B* and *C D*, his intended wife, during their joint lives, and after the decease of either of them with the consent in writing of the survivor of them, during his or her life, and after the decease of such survivor, at the discretion of the said trustees or trustee for the time being), sell, transfer or dispose of the same, or any part or parts thereof, for such price or prices as they or he shall think fit, AND do, and shall (with such consent, or at such discretion as aforesaid), lay out or invest the money to arise by or from such sale, transfer or disposition, in their or his names or name, in the purchase of a competent share, or competent shares, of any of the parliamentary stocks or public funds of *Great Britain*, or at interest upon government or real securities in *England*, AND do and shall, from time to time (with such consent, or at such discretion as aforesaid), alter, vary and transpose the said stocks, funds and securities, as to them or him shall seem proper; AND do and shall stand, and be possessed of, and interested in all and singular the said trust monies, stocks, funds and securities, and the dividends, interest and annual produce thereof, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations hereinafter declared or contained of or concerning the same (that is to say) UPON TRUST, that they

The parties agree and declare, that the trustees shall stand possessed of the stock, and dividends, &c. upon trust for the husband until marriage, and afterwards upon trust, either to permit the stock to remain as invested,

or to sell the same,

and invest produce in purchase of other stock, or upon government or real securities,

with power to vary securities, and to stand possessed of the trust-monies, &c. and dividends, &c.

upon trust,

Settlement before marriage.

the said *E F* and *G H*, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall, from time to time, in the first place, by and out of the dividends, interest and annual produce of the said trust-monies, stocks, funds and securities, pay the annual premium upon the said policy of assurance hereinbefore assigned or expressed and intended so to be, so as to keep the same on foot during the life of the said *A B*, and (subject, and without prejudice, to the payment of the annual premium upon the said instrument or policy of assurance), do and shall pay the dividends, interest and annual produce of the said trust-monies, stocks, funds and securities to, or permit the same to be received by the said *A B*, and his assigns, during his natural life, and after his decease, to or by the said *C D*, and her assigns, during her natural life; AND after the decease of the survivor of them, the said *A B* and *C D*, do and shall stand, and be possessed of, and interested in the said trust-monies, stocks, funds and securities, and the dividends, interest and annual produce thereof, IN TRUST for all and every the children and child of the said *A B* by the said *C D*, his intended wife, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, to be divided between or among such children if more than one, in equal shares or proportions, and if there shall be but one such child, the whole to be in trust for that one child: PROVIDED always, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said *E F* and *G H*, and the survivor of them, and the executors, administrators, and assigns of such survivor, at any time or times after the decease of the said *A B*, and during the lifetime of the said *C D*, in case she shall so direct, by any writing or writings under her hand, to levy and raise any part or parts of the expectant portion or portions of any child or children of the said intended marriage, under the trusts aforesaid, not exceeding in the whole for any one such child one moiety or equal half part or share of his or her expectant portion, and to pay and apply the same for his, her, or their preferment, advancement or benefit, in such manner as the said *E F* and *G H*, or the survivor of them, or the executors, administrators or assigns of such survivor shall in

out of the dividends to pay the annual premium of the policy of assurance,

and subject thereto,

to pay the dividends to husband for life, and after his decease to wife for life, and after the decease of the survivor

in trust for the children in equal shares, sons' shares payable at 21, the daughters' shares at that age or marriage; if but one child, the whole to that one child.

Power for trustees, by direction of wife, to raise parts of expectant portions of children, not exceeding in the whole one half for the children's advancements,

Settlement before marriage.

their or his discretion think fit, notwithstanding the portion or portions of such child or children shall not then have become vested or payable; AND it is hereby agreed and declared between and by the parties to these presents, that the said *E F* and *G H*, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall, after the decease of the survivor of them, the said *A B* and *C D*, pay and apply the whole, or such part as the said *E F* and *G H*, or the survivor of them, or the executors, administrators and assigns of such survivor shall think fit, of the dividends, interest or annual produce of the portion or respective portions to which any child or children of the said intended marriage shall or may, for the time being, be entitled in expectancy, under the trusts aforesaid, for or towards his, her, or their maintenance and education respectively, in the mean time, and until his, her or their portion or portions respectively shall become payable: PROVIDED always, and it is hereby agreed and declared between and by the parties to these presents, that if there shall be no child of the said intended marriage, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, then and in such case the said *E F* and *G H*, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall, from and after the decease of the said *C D*, and such default or failure of issue of the said intended marriage as aforesaid, stand and be possessed of and interested in all and singular the said trust-monies, stocks, funds, and securities, and the dividends, interest and annual produce thereof, or such part thereof respectively as shall not have been applied or disposed of under any of the trusts, powers or authorities aforesaid, IN TRUST for the said *A B*, his executors, administrators and assigns, for his and their proper use and benefit; AND it is hereby agreed and declared between and by the parties to these presents, that the said *E F* and *G H*, their executors, administrators and assigns, shall stand and be possessed of, and interested in the said instrument or policy of assurance, and other the premises hereinbefore assigned or expressed and intended so to be, in trust for the said *A B*, his executors, administrators and assigns in the mean time, and until the said intended marriage shall

and after the decease of the survivor of husband and wife,

to pay parts of children's portions for their maintenance, &c.;

and in case there shall be no child, to attain a vested interest

in trust for the husband absolutely.

And as to the policy of assurance in trust for the husband until the marriage, and afterwards

be had and solemnized; and from and after the solemnization thereof, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations hereinafter expressed or declared, of and concerning the same (that is to say), UPON TRUST, that they, the said *E F* and *G H*, and the survivor of them, and the executors, administrators and assigns of such survivor, do and shall, after the decease of the said *A B*, call in and receive the sum or sums of money which shall or may become due or payable under or by virtue of the said instrument or policy of assurance; AND do and shall lay out or invest the same, in their or his names or name, in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of *Great Britain*, or at interest upon government or real securities in *England*, AND do and shall, from time to time (with the consent of the said *C D* during her life, and after her decease, at the discretion of the said trustees or trustee for the time being), alter, vary and transpose the same stocks, funds or securities as to them or him shall seem proper, AND do and shall stand and be possessed of and interested in the sum or sums of money to become payable by virtue of or under the said instrument or policy of assurance as aforesaid, and the stocks, funds or securities in or upon which the same shall be laid out or invested, and the interest, dividends and annual produce thereof, upon and for such of the trusts, intents and purposes, and with, under and subject to such of the powers, provisoes, agreements and declarations hereinbefore declared or contained of or concerning the said sum of £2000 3 *per cent.* reduced bank annuities, and the dividends and annual produce thereof as shall or may be subsisting or capable of taking effect. AND it is hereby agreed and declared between and by the parties to these presents, that the provision hereinbefore made for the said *C D* is so made for her as aforesaid, and she doth hereby accept the same in lieu, bar and satisfaction of the dower or thirds and freebench, to which by the common law, or by custom, or otherwise, she, the said *C D*, may or otherwise might have become entitled out of or in any lands or hereditaments of which the said *A B* shall or may at any time during the said intended coverture be seised for any

Settlement before marriage.

upon trust

after decease of husband, to call in the money payable thereon,

and invest the same upon government or real securities,

with power to vary securities,

and to stand possessed of the money payable under the policy, and the securities upon which the same should be invested, and the dividends, &c. upon the same trusts as before declared of the stock and dividends, &c.

Agreement, that the provision made for the wife, shall be in bar of dower, &c.

Settlement before marriage.

estate of inheritance, or for any estate to which dower or freebench is incident: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said *E F* and *G H*, or the survivor of them, or the executors, administrators or assigns of such survivor, for any sum or sums of money payable to them or him, under or by virtue of these presents, or in, or about the execution of any of the trusts or powers hereinbefore contained, shall be a sufficient and effectual discharge or sufficient and effectual discharges for the same, or so much thereof respectively as in such receipt or receipts shall be expressed or acknowledged to be received; and that the person or persons to whom the same shall be given, his, her or their heirs, executors, administrators or assigns, shall not afterwards be answerable or accountable for any loss, misapplication or non-application, or be in anywise obliged or concerned to see to the application of the money therein mentioned and acknowledged to be received: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that if the said trustees in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them, or either of them, as hereinafter is mentioned, shall happen to die, or be desirous of being discharged of and from, or refuse, or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed and discharged, then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for the said *A B* and *C D*, his intended wife, or the survivor of them, or the executors or administrators of such survivor, by any deed or deeds, instrument or instruments in writing, sealed and delivered by them, him or her, in the presence of and attested by two or more credible witnesses, from time to time to nominate, substitute or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust-monies and

Declaration that the receipts of the trustees shall be sufficient discharges.

Power to appoint new trustees.

premises which shall then be vested in the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon, with all convenient speed, assigned and transferred in such sort and manner, and so that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust-monies and premises respectively, and such new or other trustee or trustees, or, if there shall be no continuing trustee or trustees of the same trust-monies and premises, then in such new trustee or trustees only upon the same trusts as are hereinbefore declared of and concerning the same trust-monies and premises respectively, (the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse, decline, or become incapable to act as aforesaid,) or such of them as shall or may be then subsisting and capable of taking effect; and that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on and execution of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustee or trustees of the same trust-monies and premises respectively, if there shall be any such continuing trustee or trustees, if not, then by himself or themselves as fully and effectually, and with all the same power and powers, authority and authorities of consent, approbation, discretion, calling in, laying out, and investing, giving and signing receipts, and effectual indemnifications and discharges, and all other powers and authorities whatsoever, to all intents, effects, constructions and purposes whatsoever, as if he or they had been originally in and by these presents nominated trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, and as the trustee or trustees in these presents named, his or their executors or administrators in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done under and by virtue of these presents, if then living and continuing to act in the trusts hereby reposed in them or him, any thing hereinbefore contained to

Settlement before marriage.

Settlement before marriage.

the contrary thereof in any wise notwithstanding: PROVIDED ALWAYS, and it is hereby declared, that the said several trustees hereby nominated and appointed, or to be appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the executors, administrators and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their, or any of their giving, or signing, or joining in giving or signing any receipt or receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects or defaults of the other or others of them, but each and every of them only for his and their own acts, receipts, neglects or defaults respectively; and that any one or more of them shall not be answerable or accountable for any banker, broker or other person with whom, or in whose hands any part of the said trust-monies shall or may be deposited or lodged for safe custody or otherwise in the execution of the trusts hereinbefore mentioned; and that they or any of them shall not be answerable or accountable for the insufficiency or deficiency of any security or securities, stocks or funds, in or upon which the said trust-monies or any part thereof shall be placed out or invested, nor for any other misfortune, loss or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful default respectively: AND ALSO that it shall and may be lawful to and for them, the said trustee or trustees to be appointed as aforesaid, and every or any of them, their and every of their executors, administrators and assigns, by and out of the monies which shall come to their respective hands, by virtue of the trusts aforesaid, to retain to and reimburse himself and themselves respectively, and also to allow to his and their co-trustee and co-trustees, all costs, charges, damages and expenses which they or any of them shall or may suffer, sustain, expend, disburse, be at, or be put unto, in or about the execution of the aforesaid trusts, or in relation thereunto. IN WITNESS, &c.

Clause to indemnify the trustees.

No. VIII.

A Power to jointure contained in a Will (*a*).

PROVIDED ALWAYS, and I do hereby declare my will and mind to be, that it shall and may be lawful to and for my said son *H V A*, or any son or sons I may hereafter have by my said wife, when, and as under, and by virtue of the limitations hereinbefore contained, they shall severally and respectively be in the actual possession of or entitled to the first estate of freehold of and in the said capital messuage or mansion-house and other hereditaments hereinbefore devised, or expressed and intended so to be, either before or after their respective marriages with any woman or women with whom they respectively may intermarry, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by them respectively sealed and delivered in the presence of, and to be attested by two or more credible witnesses, or by their respective last will and testament in writing, or any codicil or codicils thereto, and to be signed and published in the presence of, and to be attested by three or more credible witnesses, to GRANT, LIMIT AND APPOINT unto and to the use of, or in trust for any such woman or women whom they shall respectively so marry, for her or their life or lives, and for her or their jointure or jointures, and in bar, or without being in bar of her or their dower, any annual sum or yearly rent charge, or annual sums or yearly rent charges, not exceeding in the whole the sum of £500, unless the portion or fortune of such woman or women respectively shall exceed in amount or value the sum of £5000; and if the portion or fortune of such woman or women respectively shall exceed in value the sum of £5000, then such annual sum or yearly rent charge as shall be equal to £10 *per cent. per annum* on the amount or value of such portion or fortune, not exceeding in the whole

POWER.

For testator's son, *H V A*, or any other of his sons when in possession

of the devised hereditaments before or after marriage

by deed, to be sealed and delivered and attested by two witnesses,

or by will, to be signed, and published, and attested by three witnesses,

to *appoint* to any wife for her jointure an annual sum or yearly rent charge of 500*l.* unless their wife's fortune shall exceed 5000*l.*;

and then such annual sum, &c. as shall be equal to 10*l. per cent. per annum* on the amount of such fortune,

(*a*) Vide Vol. I. p. 488.

Jointuring power.

tax free; and to commence immediately after the decease of the person making such jointure, and to be charged upon the devised hereditaments, with powers and remedies for recovering the same when in arrear; and also to grant and demise the devised hereditaments for a term, to take effect immediately after the decease of the person making such grant, &c. so as such term be determinable on the ceasing of the rent charge: PROVIDED that the devised hereditaments shall not at any one time be liable to the payment of annual sums for jointures, exceeding in the whole 1500*l.*

the annual sum of £1000 by the year for any such woman, tax free, and without any deduction, and to commence and take effect immediately after the decease of the person making any such grant, limitation and appointment, and to be issuing and payable out of, and charged, and chargeable upon all or any part or parts of the said capital messuage or mansion-house, and other hereditaments hereby devised, together with such powers and remedies for recovering the same when in arrear, and for defraying all costs and expenses occasioned by the non-payment thereof, as to the person making such grant, limitation and appointment shall seem meet; AND ALSO to GRANT, DEMISE, LIMIT OR APPOINT all or any of the same capital messuage or mansion-house, and other hereditaments, to any person or persons for any term or terms of years, to take effect immediately after the decease of the person making any such grant, limitation or appointment for better securing the due payment of such rent charge as to them respectively shall seem meet, so as such term or terms of years be made determinable on the ceasing of the rent charge or rent charges thereby secured, and the payment of all arrears thereof, and of all costs, charges and expenses occasioned by the non-payment thereof: PROVIDED ALWAYS, and I do hereby further declare my will and mind to be, that the said capital messuage or mansion-house, and other hereditaments hereby devised, shall not, under or by virtue of the power hereinbefore contained, be at any one time subject or liable to the payment of any annual sum or sums for jointures exceeding in the whole the sum of £1500, so that if, under the power of jointuring hereinbefore contained, the said capital messuage or mansion-house and other hereditaments, or any part or parts thereof, would, in case this present proviso had not been inserted, be charged with a greater annual sum for jointures in the whole than the said annual sum of £1500, the payment of the annual sum or sums, by reason of the charging or granting whereof such excess shall have been occasioned, or such part thereof as shall occasion the same, shall during the time of such excess be suspended,

No. IX.

Settlement by Husband to secure to Wife Pin-money; also a Jointure under the preceding Power (*a*).

THIS INDENTURE made, &c. Between *H V A* of of the first part, *E T M* of of the second part, *J B* of *A B* of *H G* of and *J C* of of the third part: Parties.

RECITES the will of *H W A*, whereby the estates hereinafter demised were devised to the said *H V A* for life, with remainder to his sons, &c. in tail, with the power of jointuring hereinafter exercised: AND RECITES the death of the testator: Recitals.

AND WHEREAS a marriage hath been agreed upon, and is intended shortly to be had and solemnized between the said *H V A* and the said *E T M*: AND WHEREAS upon the treaty for the said intended marriage it was agreed (among other things) that the said *H V A* should secure out of the messuages or tenements, lands, and other hereditaments hereinafter particularly mentioned and intended to be hereby demised and appointed, the clear yearly sum of £400 of lawful money of *Great Britain*, for the separate use of the said *E T M* BY WAY OF PIN MONEY during the joint lives of herself and him the said *H V A*, and should also, in exercise of the aforesaid power given to him by the said will of his said late father in that behalf, limit and secure to her the said *E T M* and her assigns during her life, in case she shall survive him the said *H V A*, a clear annual sum or yearly rent charge of £1000 of like lawful money to be issuing out of and charged upon the same messuages or tenements, lands, and hereditaments, BY WAY OF JOINTURE and in bar of her dower: NOW THIS INDENTURE WITNESSETH that in performance of the said agree- Also recites, the intended marriage, and husband's agreement to secure to wife's separate use the clear yearly sum of 400*l.* by way of *pin money*, and also a yearly rent charge of 1000*l.* for her *jointure*. WITNESSETH that in performance of

(*a*) Vide Vol. I. p. 481.

Settlement to secure wife's pin money and jointure.

ment in this behalf, and in consideration of the said intended marriage, and also for and in the consideration of the sum of 10*s.* of lawful money of *Great Britain* to the said *H V A* by the said *J B*, *A B*, *H G*, and *J C*, paid at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) he the said *H V A*, with the privity and approbation of the said *E T M* (testified by her being a party to and sealing and delivering these presents) HATH granted, bargained, sold, and demised, and by these presents DOTH grant, bargain, sell, and demise unto the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, and assigns, ALL, &c. (the parcels) TOGETHER with all and singular houses, outhouses, edifices, buildings, barns, stables, gardens, orchards, backsides, lofts, lands, meadows, pastures, commons, common of pasture, common of turbary, mines, minerals, quarries, furzes, trees, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the said messuages or tenements, hereditaments, and premises belonging or in any wise appertaining to or with the same or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or any part of them or appurtenant thereunto, with their and every of their appurtenances: TO HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments, and all and singular other the premises hereinbefore granted, bargained, sold, and demised, or intended so to be, with their and every of their appurtenances, unto the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, and assigns, from thenceforth for and during and unto the full end and term of 99 years in case the said *H V A* and the said *E T M*, his intended wife, shall both so long live, upon the trusts nevertheless, and for the intents and purposes hereinafter declared concerning the same (that is to say), UPON TRUST for the said *H V A* until the said intended marriage shall be solemnized, and from and after the solemnization thereof, UPON TRUST that the said *J B*, *A B*, *H G*, and *J C*, and the survivors and survivor of them, and the executors or

his agreement husband with the privity of wife,

demises, &c.

Parcels and general words.

HABENDUM.

To the trustees,

for a term of 99 years in case intended husband and wife should both so long live.

Upon trust after the marriage,

Settlement to secure wife's pin money and jointure.

administrators of such survivor, shall and do, by and out of the rents, issues, and profits of the said premises comprised in the said term of 99 years, from time to time levy and raise the yearly sum of £400 of lawful money of *Great Britain*, clear of all deductions, reprisals, or outgoings whatsoever, for the sole and separate use of the said *E T M*, AS OR FOR PIN MONEY, and pay the same by equal quarterly payments into the proper hands of the said *E T M* for her separate use, or pay or dispose of the same to such other person or persons and for such uses and purposes as she by any writing or writings under her hand shall, notwithstanding her coverture, from time to time, and without disposing of the same in the way of *anticipation*, order, and direct, TO THE INTENT that the same or any part thereof may not be subject or liable to the debts or engagements, control or interference of the said *H V A*, her intended husband, the first of such payments to be made at the end of three calendar months next after the said intended marriage shall be solemnized: AND ALSO upon trust to permit or suffer the said *H V A*, or his assigns, from time to time to receive and take the residue of the rents, issues, and profits of the premises comprised in the said term for his and their own use: AND it is hereby agreed and declared that the receipt and receipts of the said *E T M*, and also such order and orders in writing under her hand as aforesaid for all such sum or sums of money as shall be paid to her or to such other person or persons as she shall direct or appoint of the said yearly sum of £400, or any part thereof, shall, notwithstanding her coverture, be a good and sufficient discharge and good and sufficient discharges for the same: PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties to these presents that it shall and may be lawful to and for the said *J B*, *A B*, *H G*, and *J C*, or any of them, their or any of their executors, administrators, and assigns, in the first place to deduct, retain, and discharge by and out of the rents, issues, and profits of the premises comprised in the said term of 99 years or any of them, all such costs, charges, damages, and expenses as they or any of them shall or may bear, expend, or be put unto, in, or about the execution of the trusts of the said term of 99 years, or in any wise relating thereto, any thing

out of the rents, &c. to raise the clear yearly sum of 400*l.* for wife's separate use for pin money, to be paid quarterly.

And to permit husband to receive the residue of the rents for his use.

Agreement that the wife's receipts shall be effectual discharges.

Power to trustees to reimburse themselves all expenses attending the execution of their trusts.

Settlement to secure wife's pin money and jointure.

hereinbefore contained to the contrary thereof in any wise notwithstanding: AND THIS INDENTURE FURTHER WITNESSETH that in performance of the said agreement in this behalf, and in consideration of the said intended marriage,

AND pursuant to the power,

and pursuant to and by force and virtue and in exercise and execution of the power or authority to the said *H V A* limited or given by the said will of the said *H W A*, as hereinbefore is mentioned, and of every or any other power or authority whatsoever in any wise enabling him in this behalf, he the said *H V A* by this present deed or writing, sealed and delivered by him in the presence of and attested by the two credible persons whose names are intended to be hereupon indorsed as witnesses, attesting the sealing and delivery of these presents by the said *H V A*,

the husband with the privity of the wife, appoints, that immediately after his decease, in case his wife shall survive, she shall receive for a jointure, in bar of dower,

DOTH with the privity and approbation of the said *E T M* (testified as aforesaid) grant, limit, and appoint THAT from and immediately after the decease of him the said *H V A* (in case the said intended marriage shall take effect, and the said *E T M* shall happen to survive him) she the said *E T M* and her assigns shall and may have, receive, and take, during the term of the natural life of the said *E T M* as and for a jointure, and in lieu, bar, and satisfaction of dower or thirds and freebench, right, title, claim, or possibility of dower or thirds and freebench which the said *E T M* can or may, or could or might have or demand in or out of all or any of the messuages or tenements, lands, and hereditaments of or to which the said *H V A* shall at any time or times during the said intended coverture be seised or entitled for any estate or interest to which dower, thirds or freebench may be incident, one annuity or yearly rent charge of £1000 of lawful money of *Great Britain* to be issuing out of and charged upon all and every the messuages or tenements, lands, hereditaments, and premises, with the appurtenances hereinbefore particularly described and granted, bargained, sold, and demised, or intended so to be, and to be payable and paid to the said *E T M* or her assigns in the common dining hall of *Lincoln's Inn*, in the county of *Middlesex*, by four equal quarterly payments on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th day of *December* in every year, tax free and without any deduction, the first payment

a yearly rent charge of 1000*l.* charged upon the premises comprised in the term,

to be paid quarterly,

without any deduction.

thereof to be made on such of the said days of payment as shall next happen after the decease of the said *H V A*; AND ALSO that if the said annuity or yearly rent charge of £1000 hereby limited, or any part thereof, shall at any time or times be in arrear or unpaid by the space of 21 days next after any of the days hereby appointed for the payment thereof as aforesaid, then and so often it shall be lawful to and for the said *E T M* and her assigns, during the term of her natural life to enter into and distrain upon the said messuages or tenements, hereditaments, and premises hereby granted, limited, and appointed, or any part or parts thereof, and to dispose of the distresses then and there found according to law, to the intent that thereby or otherwise the said annual sum or yearly rent charge of £1000 and every part thereof so in arrear and unpaid, and all costs, charges, and expenses occasioned by reason of the nonpayment thereof shall be fully paid and satisfied; AND FURTHER, that in case the said annual sum or yearly rent charge of £1000, or any part thereof, shall at any time or times be in arrear or unpaid by the space of 40 days next after any of the days appointed for the payment thereof as aforesaid, then and so often, (although there shall not have been any legal demand made thereof) it shall be lawful to and for the said *E T M* and her assigns during the term of her natural life to enter into and upon and hold the said messuages or tenements, hereditaments, and premises hereby granted, limited, and appointed, or any part or parts thereof, and to receive and take the rents, issues, and profits thereof to her and their own use until she and they shall therewith and thereby or otherwise be fully paid and satisfied the said annual sum or yearly rent charge of £1000 and the arrears thereof due at the time of such entry, or afterwards to become due during her or their being in possession of the same premises, together with all costs, charges, and expenses which she or they shall sustain by reason of the nonpayment thereof, and such possession when taken to be without impeachment of waste: AND THIS INDENTURE FURTHER WITNESSETH that for the considerations aforesaid, and for the more effectually securing the payment of the said annuity or yearly rent charge of £1000 hereby limited unto the said *E T M* and her assigns, and pursuant to and by force and virtue and in further

Settlement to secure wife's pin money and jointure.

Powers of distress and entry for recovery of rent charge when in arrear.

AND for more effectually securing payment of the rent charge.

Settlement to secure wife's pin money and jointure.

exercise and execution of the power and authority limited and given to the said *H V A* by the said will of the said *H W A* and of every or any other power or authority enabling him in this behalf, he the said *H V A*, with the privity and approbation of the said *E T M* (testified as aforesaid) doth, by this deed or writing so sealed and delivered by him and so attested as aforesaid, grant, demise, limit, and appoint that in case the said intended marriage shall take effect, and the said *E T M* shall happen to survive him, all and every the said messuages or tenements, lands, hereditaments, and premises hereinbefore particularly described and granted, bargained, sold, and demised, or expressed so to be, with the appurtenances, shall from and immediately after the decease of him the said *H V A* remain and be (subject and without prejudice to the said annual sum or yearly rent charge of £1000 hereinbefore limited to said *E T M* and her assigns for her life and to the powers and remedies hereinbefore limited or given to her for the recovery thereof when in arrear as aforesaid): To THE USE of the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, and assigns for and during the full term of 200 years, to be computed from the day of the death of the said *H V A*, UPON THE TRUSTS and for the intents and purposes, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed and contained of and concerning the same, that is to say, IN TRUST for better securing to the said *E T M* and her assigns during her life in case she shall survive the said *H V A*, the payment of the said annual sum or yearly rent charge of £1000 hereinbefore limited to her as aforesaid, as the same shall from time to time become due and payable; and for that end and purpose, in case the same annual sum or yearly rent charge or any part thereof shall at any time or times be behind or unpaid by the space of 60 days after any of the said days whereon the same is hereinbefore made payable and ought to be paid as aforesaid, then and so often (although no formal or legal demand shall have been made thereof) it shall and may be lawful to and for the said *J B*, *A B*, *H G*, and *J C*, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, and they and he are and is hereby respectively authorised from time to time to enter

husband in further execution of his power, appoints, that the premises comprised in the term, shall immediately after his decease remain and be

to the use of the trustees,

for a term of 200 years.

In trust for better securing payment of the rent charge,

with power of distress and entry for recovering payment thereof when in arrear for 60 days,

into and upon all and every or any part or parts of the said messuages or tenements, lands, hereditaments, and premises so hereby granted, limited, and appointed, and to receive and take the rents, issues, and profits thereof, and by and out of the same rents, issues, profits, or by bringing actions against the tenants or occupiers of the same premises for the recovery of the rents then in arrear, or by making entries upon all or any part of the said premises, or by all or any of the said ways or means or by any other ways and means to levy, raise, and pay all such arrears of the said annual sum or yearly rent charge of £1000 as shall be from time to time so due and unpaid to her the said *E T M* or her assigns, together with all such costs, charges, damages, and expenses as she the said *E T M*, her executors, administrators, and assigns, or the said *J B*, *A B*, *H G*, and *J C*, or any of them, their or any of their executors, administrators, or assigns shall or may sustain, expend, or be put unto by reason of the nonpayment thereof, and the recovery or obtaining payment of the same annual sum or yearly rent charge or any part thereof or otherwise in the execution of the said trusts; AND do and shall permit and suffer the person or persons for the time being entitled to the reversion or freehold of the premises comprised in the said term of 200 years, expectant on the determination thereof, to receive and take the rents and profits of the same premises, over and above what shall be necessary to be applied for satisfying the trusts hereby declared of the same term: PROVIDED ALWAYS, and it is hereby declared by and between the said parties hereto, that from and after the death of the said *E T M*, and upon full payment of all arrears (if any) of the said yearly rent charge of £1000 hereby limited, and of all costs and expenses occasioned by the nonpayment thereof, the said term of 200 years of and in the said messuages or tenements, lands, hereditaments, and premises comprised therein shall cease, determine, and be void, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: PROVIDED ALWAYS and it is hereby agreed and declared between and by the parties to these presents that the receipt or receipts in writing of the said *J B*, *A B*, *H G*, and *J C*, or the survivors or survivor of them, or the heirs, executors, administrators, or assigns respectively of such survivor, for any sum or sums of money payable to them or him under or by virtue of these

Settlement to secure wife's pin money and jointure.

and to reimburse themselves all costs and expenses,

and to permit the person or persons for the time being entitled to the reversion and freehold of the premises to receive the surplus rents.

Proviso for determining the term on the ceasing of the rent charge.

Declaration that the receipts of the trustees shall be effectual discharges.

Settlement to secure wife's pin money and jointure.

presents, or in or about the execution of any of the trusts or powers hereinbefore contained, shall be a sufficient and effectual discharge, or sufficient and effectual discharges for the same, or so much thereof respectively as in such receipt or receipts shall be expressed or acknowledged to be received; and that the person or persons to whom the same shall be given, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for any loss, misapplication, or nonapplication, or be in any wise obliged or concerned to see to the application of the money therein mentioned and acknowledged to be received: PROVIDED ALWAYS and it is hereby agreed and declared between and by the said parties to these presents, that if the said trustees in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them or any of them as hereinafter is mentioned, shall happen to die or be desirous of being discharged of and from, or refuse, or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed, or discharged, then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for the said *H V A*, and *E T M* his intended wife, or the survivor of them, or the executors or administrators of such survivor, by any deed or deeds, instrument or instruments in writing to be sealed and delivered by them, him, or her, in the presence of and attested by two or more credible witnesses, from time to time to nominate, substitute, or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid, and that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust estates and premises which shall then be vested in the trustee or trustees so dying, desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon with all convenient speed conveyed, limited, appointed, and assured in such sort and manner and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust

Power to appoint new trustees.

estates and premises respectively, and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates and premises, then in such new trustees only, to the same uses and upon the same trusts as are hereinbefore declared of and concerning the same trust estates and premises respectively, (the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse, decline, or become incapable to act as aforesaid), or such of them as shall or may be then subsisting and capable of taking effect, and that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on, and execution of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustee or trustees of the same trust estates and premises respectively, if there shall be any such continuing trustee or trustees; if not, then by himself or themselves, as fully and effectually, and with all the same power and powers, authority and authorities, giving and signing receipts and effectual indemnifications and discharges, and all powers and authorities whatsoever, to all intents, effects, constructions, and purposes whatsoever, as if he or they had been originally in and by these presents nominated trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, and as the trustee or trustees in these presents named, his or their heirs, executors, or administrators, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done under and by virtue of these presents if then living and continuing to act in the trusts hereby reposed in them or him, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: PROVIDED ALWAYS, and it is hereby declared that the said several trustees hereby nominated and appointed, or to be appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the heirs, executors, administrators, and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their or any of their giving or signing,

Settlement to secure wife's pin money and jointure.

Clause for the indemnity of the trustees.

Settlement to secure wife's pin money and jointure.

or joining in giving or signing any receipt or receipts for the sake of conformity, and any one or more of them shall not be answerable or accountable for the others or other of them or for the acts, receipts, neglects, or defaults of the others or other of them, but each and every of them only for his and their own acts, receipts, neglects, or defaults respectively; and that any one or more of them shall not be answerable or accountable for any banker, broker, or other person with whom or in whose hands any part of the said trust monies shall or may be deposited or lodged for safe custody, or otherwise in the execution of the trusts hereinbefore mentioned; and that they or any of them shall not be answerable or accountable for misfortune, loss, or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful default respectively: AND ALSO that it shall and may be lawful to and for them the said trustees in these presents named, and such future trustee or trustees to be appointed as aforesaid, and every or any of them, their and every of their heirs, executors, administrators, and assigns, by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain to and reimburse himself and themselves respectively, and also to allow to his and their co-trustee and co-trustees all costs, charges, and expenses which they or any of them shall or may suffer, sustain, expend, disburse, be at, or be put unto, in, or about the execution of the aforesaid trusts or in relation thereunto: PROVIDED ALWAYS nevertheless, and it is hereby expressly agreed and declared between and by the said parties to these presents, that the premises hereinbefore granted and demised to the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators and assigns, for the said term of 99 years determinable as aforesaid, and the said annual sum or yearly rent charge of £1000, and the powers and remedies for the recovery thereof hereinbefore granted, limited, and appointed to the said *E T M* and her assigns, and the premises hereinbefore granted, limited, and appointed to the use of the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, and assigns, during the said term of 900 years, to take effect after the decease of the said *H V A* as aforesaid, are so granted, limited, and

Agreement that the premises are granted, &c.

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appointed, subject and without prejudice to the power of leasing limited and given to the said *H V A* in and by the said will of the said *H W A* as aforesaid, and to every such lease and leases as shall be granted by him of the premises or any part thereof pursuant to such power, it being the true intent and meaning of these presents and of the parties thereto, that it shall and may be lawful for the said *H V A* to exercise such power from time to time as fully, and that every such lease or leases to be made pursuant to the same, shall be as valid and take effect in like manner as if these presents had not been made, any thing hereinbefore contained to the contrary notwithstanding: AND the said *H V A*, for himself, his heirs, executors, and administrators, doth hereby covenant, agree, and declare to and with the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, or assigns, that he the said *H V A* hath not made, done, or committed, or willingly suffered to be done any act, matter, or thing whatsoever whereby or by reason whereof the premises hereinbefore granted, bargained, sold, and demised, or intended so to be, or any part thereof, are, is, can, shall, or may be impeached, charged, or incumbered in title, estate, or otherwise, or whereby or by reason whereof the power or authority given or limited to him by the said will of his said late father, and intended to be exercised by these presents, now is released, extinguished, suspended, prejudiced, or affected; AND ALSO that for and notwithstanding any act, matter, or thing done or suffered by him the said *H V A*, or by the said *H W A* or any of his ancestors, the said *E T M* and her assigns, (in case the said intended marriage shall take effect and she shall survive him), shall and may have, receive, and take the said annual sum or yearly rent charge of £1000, tax free, and have and exercise such powers and remedies for the recovery thereof when in arrear as aforesaid out of and upon all and every or any of the premises hereby charged or intended to be charged with the same as aforesaid, according to the true intent and meaning of these presents, and all and every the premises hereinbefore granted and demised, limited and appointed unto and to the use of the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, and assigns for the said several terms of 99 years and 200 years respectively, shall from time to time re-

without prejudice to the power of leasing given to the husband and to leases granted by him pursuant to such power.

Covenants by husband that he hath done no act to incumber,

nor whereby the power exercised is released or extinguished.

And that wife shall receive her rent charge and exercise the powers and remedies for recovery thereof upon the premises charged.

And for quiet enjoyment.

Settlement to secure wife's pin money and jointure.

main and be upon the trusts, and for the intents and purposes, and subject to the powers, provisoes, agreements, and declarations hereinbefore expressed or declared of or concerning the same respectively, and be held and enjoyed according to the true intent and meaning of these presents, without any hindrance, interruption, or disturbance whatsoever from or by the said *H V A*, or any person or persons whomsoever lawfully claiming or to claim by, from, or under him, or by, from, or under the said testator *H W A*, or any of his ancestors, (save and except the subsisting leases of the premises): AND FURTHER, that he the said *H V A*, in case the said intended marriage shall take effect, shall and will, at the request of the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed all such other acts, deeds, or assurances for the better and more effectually granting, limiting, settling and appointing unto and to the use of the said *E T M*, or her assigns, such annual sum or yearly rent-charge of £1000, with such powers and remedies for the recovery thereof when in arrear as aforesaid, to be issuing out of and charged upon all and every the premises hereinbefore mentioned, and for the better and more effectually granting, limiting, or assuring all and every or any of the premises hereinbefore granted and demised, limited and appointed, or intended so to be unto and to the use of the said *J B*, *A B*, *H G*, and *J C*, their executors, administrators, or assigns, for the said several terms of 99 years and 200 years respectively, or either of them, according to the true intent and meaning of these presents as by the said *J B*, *A B*, *H G*, and *J C*, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, or any of them, shall be reasonably devised or advised and required. IN WITNESS, &c.

And for further assurance.

No. X.

A Conveyance to uses to bar Dower, with a Release from a Dowress of her Dower, to which she was entitled as the Widow of her former Husband, with a Covenant on the part of her second Husband, that she will join him in levying a Fine (*a*).

THIS INDENTURE made the day of , in the year, &c. BETWEEN *J R* of (surviving trustee named in the indenture of release or deed of settlement hereinafter recited), of the first part; *R B* of , and *H A* his wife (the daughter and devisee named in the last will and testament of *J S*, late of , deceased) of the second part; *T R* of , and *A* his wife (which said *A R* before her marriage with the said *T R* was the widow and relict of the said *J S*) of the third part; *W P* of of the fourth part, and *A B* of of the fifth part: WHEREAS the said *J S* deceased, being seised or entitled for an estate of inheritance in fee-simple in possession of or to the messuage or tenement and other hereditaments hereinafter particularly mentioned and intended to be hereby released, with their appurtenances, duly made, signed and published his last will and testament in writing, bearing date the day of , and thereby (among other things) gave and devised unto his daughter the said *H A B*, (then *H A S*, spinster), the said messuage or tenement and other hereditaments hereinafter particularly mentioned and intended to be hereby released, with their appurtenances, to hold the same from and immediately after his decease, to his said daughter *H A B*, her heirs and assigns for ever; AND WHEREAS the said *J S* departed this life on or about, &c. &c. without having revoked or altered his said will, leaving the said *A R*, then *A S*, his widow and relict; AND WHEREAS by in-

Parties.

Recites the will of *J S*.

The death of *J S*.

The marriage settlement of *R B* and wife,

(*a*) Vide Vol. I. p. 523.

Conveyance to uses to bar dower.

dentures of lease and release, bearing date respectively the days of , the release being made or expressed to be made between the said *R B* and *H A*, his wife, of the first part; *O M* of , and *R W* of the second part; and *M B*, (since deceased), and the said *J R* of the third part (being the settlement made in pursuance of certain articles of agreement bearing date the day of then last, and made and executed previously to and in contemplation of the marriage then intended, and which was soon afterwards solemnized between the said *R B* and *H A*, his wife); AND by a fine levied in pursuance of the said indenture of release in his Majesty's court of Common Pleas at *Westminster*, in or as, of term, the said messuage or tenement and other hereditaments hereinafter particularly mentioned and intended to be hereby released, with their appurtenances, were conveyed and assured (together with other hereditaments) unto and to the use of the said *M B* and *J R*, their heirs and assigns for ever, SUBJECT TO THE DOWER OR THIRDS of the said *A R*, of and in the said hereditaments and premises to which she was entitled as the widow of the said *J S*, and upon the several trusts, and to and for the several ends, intents and purposes therein expressed and declared, and in part hereinafter mentioned, (that is to say) UPON TRUST, that they the said *M B* and *J R*, and the survivor of them, and the heirs, executors, administrators or assigns of such survivor, should, when thereunto required in writing by the said *R B* and *H A*, his wife, or the survivor of them; and after the decease of the survivor, then when and as soon as it should appear to the said *M B* and *J R* or the survivor of them, his heirs, executors, administrators or assigns, to be convenient or proper, make sale and dispose of all and every or any part or parts of the aforesaid freehold hereditaments, with the appurtenances, either together or in parcels, and either by public sale, private contract or otherwise, as to them the said trustee or trustees for the time being should seem proper; AND it was agreed and declared, that the receipt or receipts of the said *M B* and *J R*, or the survivor of them, or of the heirs, executors or administrators of such survivor, for any sum or sums of money to arise from any such sale or sales as aforesaid, or which should be paid to them, him or any

and the trusts of the settlement.

of them, under or by virtue, or for the purposes of the said indentures now in recital, should from time to time be a good and sufficient discharge, or good and sufficient discharges to the purchaser or purchasers of the said premises or any part thereof, or to such person or persons as should so pay the same, or to his, her or their respective heirs, executors, administrators or assigns; and that the purchaser or purchasers, or other person or persons paying such sum or sums of money, and taking such receipt or receipts for the same as aforesaid, and his, her or their respective heirs, executors, administrators or assigns, should not afterwards be answerable or accountable for the loss, misapplication or nonapplication thereof, or of any part thereof, or be in anywise concerned, or obliged to see to the application of the money in such receipt or receipts mentioned and acknowledged to be received or any part thereof, or to inquire into the reason, necessity, propriety or expediency of making any such sale or sales as aforesaid; AND WHEREAS the said *M B* departed this life in or about, &c. &c., AND WHEREAS the said *J R*, as the surviving trustee under the said in part recited indenture of settlement, and in execution of the trusts of the same indenture, hath, at the request of the said *R B* and *H A*, his wife, signified by this present writing, under their hands and seals, contracted and agreed with and to the said *W P* for the absolute sale to him of the said messuage or tenement, and other hereditaments hereinafter particularly mentioned and intended to be hereby released, with the appurtenances and the inheritance thereof in possession, free from all incumbrances (except the land-tax), at or for the price or sum of £ ; AND WHEREAS for enabling the said *J R* to perform the said contract, the said *T R* and *A* his wife, at the request of the said *R B* and *H A* his wife, have agreed to release the said purchased premises from the right of dower or thirds therein of the said *A R*; NOW THIS INDENTURE WITNESSETH, that in pursuance of the aforesaid agreement, and in consideration of the sum of £ of lawful money of *Great Britain*, at or before the sealing and delivery of these presents to the said *J R* in hand, well and truly paid by the said *W P*, at the request and by the desire of the said *R B* and *H A* his wife, and with the privity and approbation of the said *T R* and *A* his wife (testified by their

Conveyance to uses to bar dower.

The death of one trustee.

The contract for the purchase,

and the agreement of dowress to release purchased premises from her dower,

The consideration.

Conveyance to uses to bar dower.

severally being parties to, and sealing and delivering these presents), the receipt and payment of which said sum of £ they the said *J R* and the said *R B* and *H A* his wife, do hereby respectively admit and acknowledge, and of and from the same, and every part thereof, do and each and every of them doth acquit, release and discharge the said *W P*, his heirs, executors, administrators and assigns by these presents, and also in consideration of the sum of 10*s*. a piece of like lawful money to the said *R B* and *H A* and his wife, and *T R* and *A* his wife, in hand, well and truly paid by the said *W P* at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), he the said *J R*, at the request and by the direction of the said *R B* and *H A* his wife (testified as aforesaid), HATH bargained, sold and released, and by these presents DOTH bargain, sell and release; AND the said *R B* and *H A* his wife, HAVE, and each of them HATH granted, bargained, sold, aliened, released and confirmed, and by these presents DO and each of them DOTH grant, bargain, sell, alien, release and confirm, AND the said *T R* and *A* his wife, at the request and by the direction of the said *R B* and *H A* his wife (testified as aforesaid), HAVE and each of them HATH remised, released and for ever quitted claim, and by these presents DO and each of them DOTH remise, release and for ever quit claim unto the said *W P* (in his actual possession, now being by virtue of a bargain and sale to him thereof made by the said *J R*, *R B* and *H A* his wife, for 5*s*. a piece consideration, by indenture bearing date the day next before the day of the date of these presents for the term of one whole year, commencing from the day next before the day of the date of the indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and to his heirs, ALL, &c. (parcels), together with all and singular houses, outhouses, edifices, buildings, barns, stables, coachhouses, cottages, yards, gardens, orchards, backsides, lofts, lands, meadows, pastures, commons, common of pasture, common of turbary, mines, minerals, furzes, quarries, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to

The surviving trustee releases,

and *R B* and wife grant, release, and confirm, and the dowress and her husband release

unto the purchaser.

(reference to lease for a year.)

The parcels and general words,

the said messuage or tenement, hereditaments and premises belonging, or in anywise appertaining, or with the same or any of them respectively, now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken or known as part, parcel or member of them, or any of them, or appurtenant thereunto, with their and every of their appurtenances; and all deeds, evidences and writings relating to or concerning the said messuage or tenement, hereditaments and premises, or any of them solely or together, with other hereditaments of less value, now in the custody or power of the said *J R*, *R B* and *H A* his wife, or any or either of them, or which he, she or they can obtain or procure without suit at law or in equity, together with true and attested copies of all deeds, evidences and writings relating to or concerning the said messuage or tenement, hereditaments and premises, or any of them jointly, with other hereditaments of equal or greater value, the first set of copies to be delivered at the costs and charges of the said *J R*, *R B* and *H A* his wife, some or one of them, but all future copies to be made, written and taken at the request, costs and charges of the said *WP*, his heirs, appointees or assigns, AND the reversion and reversions, remainder and remainders yearly, and other rents, issues and profits of all and singular the said messuage or tenement, hereditaments and premises hereby released or expressed and intended so to be; AND all the estate, right, title, interest, inheritance, reversion, use, trust, possession, property, claim and demand whatsoever, both at law and in equity, of them the said *J R*, *R B* and *H A* his wife, or any or either of them, of, in and to the same premises or any of them, and every part and parcel thereof, TO HAVE AND TO HOLD the said messuage or tenement, lands, hereditaments, and all and singular other the premises hereby released or expressed and intended so to be, with their appurtenances (freed and discharged of and from all right of dower or thirds to which the said *A R* is anywise entitled therein or in any part thereof) unto the said *WP*, his heirs and assigns, to the uses upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations hereinafter mentioned, expressed and contained of and concerning the same; AND in pursuance

Conveyance to uses to bar dower.

and all deeds, &c.

and the reversion, &c.

and all the estate, &c.

HABENDUM

(discharged from dower.)

to the purchaser, to the uses aftermentioned.

Conveyance to uses to bar dower.

and further performance of the said agreement, and for the considerations aforesaid, and for the more effectually conveying and assuring the said messuage or tenement and hereditaments hereinbefore released or expressed and intended so to be, with their appurtenances (freed and discharged from the dower or thirds of the said *A R*), to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations hereinafter expressed, declared and contained of or concerning the same, he the said *T R* doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said *W P* and his heirs, that they the said *T R* and *A* his wife, shall and will at the costs and charges of the said *J R*, *R B* and *H A* his wife, his heirs, executors, administrators or assigns, or some or one of them, as of *Hilary* Term last, or before the end of *Easter* Term next ensuing, acknowledge and levy before his Majesty's justices of the court of Common Pleas at *Westminster*, unto the said *W P* and his heirs, a fine *sur conuzance de droit come ceo*, &c., whereupon proclamations shall be had and made according to the statute in that case made and provided, and the usual course, order and manner of fines for assurances of lands in like cases used and accustomed, of all the said hereditaments and premises hereinbefore released or expressed and intended so to be, with their appurtenances, by such names, quantities, qualities and descriptions as shall be sufficient to ascertain and comprize the same; and it is hereby agreed and declared between and by the parties to these presents, that the grant, releases and confirmation hereinbefore contained and hereby made as aforesaid, and the said fine so as aforesaid, or in any other manner, or at any other time to be acknowledged and levied by the said *T R* and *A* his wife, shall operate, and enure, and be adjudged, deemed, construed and taken to operate and enure TO SUCH USES upon such trusts, and to and for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as the said *W P* shall by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time direct, limit or

Covenant by the husband of dowress, that she shall join him in levying a fine.

Declaration that the grant, releases and confirmation, and the said fine and all other fines by the same parties,

shall enure

to such *uses* as the purchaser shall by deed, &c. appoint,

appoint, and for default of and until such direction, limitation or appointment, and so far as no such direction, limitation or appointment shall extend, TO THE USE of the said *W P* and his assigns during his life without impeachment of waste; and after the determination of that estate by forfeiture or otherwise in his lifetime, TO THE USE of the said *A B* and his heirs during the life of the said *W P*, IN TRUST for him the said *W P* and his assigns during his life, and to prevent any wife of the said *W P* from being entitled to her dower out of or in the premises or any part thereof; and after the determination of the estate so limited, in use to the said *A B* and his heirs during the life of the said *W P* as aforesaid, TO THE USE of the said *W P*, his heirs and assigns for ever (*a*); AND the said *T R* doth for himself, his heirs, executors and administrators, covenant and declare with and to the said *W P*, his heirs, appointees and assigns by these presents, that they the said *T R* and *A* his wife, have not, nor hath either of them at any time heretofore made, done, committed or executed, or knowingly or willingly permitted, or suffered, or been party or privy to any act, matter or thing whatsoever, whereby or by reason or means thereof they are in anywise prevented from releasing the said messuage or tenement, hereditaments and premises hereinbefore released or expressed and intended so to be in manner aforesaid, according to the true intent and meaning of these presents; AND the said *J R* doth for himself, his heirs, executors and administrators, covenant and declare, with and to the said *W P*, his heirs, appointees and assigns by these presents, that he the said *J R* hath not at any time heretofore made, done, committed or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter or thing whatsoever whereby or by reason or means whereof the said messuage or tenement, hereditaments and premises hereby released or expressed and intended so to be, or any of them, or any part thereof, are, is, can, shall or may be impeached, charged, affected or incumbered in title, estate, or otherwise howsoever; AND the said *R B* for himself, his heirs, executors and administrators doth covenant, promise and agree with and

Conveyance to uses to bar dower.

and for default of appointment, to the *use* of the purchaser for life, without impeachment of waste; remainder to the *use* of a trustee and his heirs during the life of the purchaser in *trust* for him for life, with remainder to the *use* of the purchaser in fee.

Covenant by the husband of the dowress, that they had done no act to prevent them from releasing the premises as aforesaid.

Covenant by trustee, that he had done no act to incumber.

Covenants for the title by *R B*

(*a*) Vide Vol. I. p. 522.

Conveyance to uses to bar dower.

to the said *W P*, his heirs, appointees and assigns by these presents in manner following (that is to say), that for and notwithstanding any act, deed, matter or thing by him the said *R B* and *H A* his wife, or the said *J S* the testator, made, done, committed or executed, or knowingly or willingly suffered to the contrary, they the said *R B* and *H. A* his wife, and *J R*, some or one of them, now have or hath in themselves, herself or himself, good right, full power, and lawful and absolute authority to grant, bargain, sell, release and convey the said messuage or tenements, and other hereditaments hereinbefore released or expressed and intended so to be, with the appurtenances thereunto belonging, unto the said *W P* and his heirs, to the uses and in manner aforesaid, according to the true intent and meaning of these presents; AND THAT the said messuage or tenement, and other hereditaments hereinbefore released or expressed and intended so to be, with their appurtenances, shall and may from time to time, and at all times hereafter, go and remain TO THE USES hereinbefore limited, expressed and declared, and be peaceably and quietly entered into and upon, and be held, occupied, possessed and enjoyed, and the rents, issues and profits thereof, and of every part thereof, had, received and taken accordingly without the lawful let, suit, trouble, interruption, claim or demand whatsoever of or by him the said *R B* and *H A* his wife, or either of them, their or either of their heirs, or of or by any other person or persons lawfully or equitably claiming, or to claim by, from or under, or in trust for them or any of them, or by, from or under the said *J S* the testator; and that free and clear, freely and clearly, and absolutely acquitted, exonerated, released, and for ever discharged or otherwise by the said *R B*, his heirs, executors or administrators, well and sufficiently saved, defended, kept harmless and indemnified of, from and against all, and all manner of former and other gifts, grants, bargains, sales, jointures, dower, right and title of dower, uses, trusts, entails, wills, statutes merchant or of the staple, recognizances, judgments, executions, rents, arrears of rent, annuities, legacies, sum and sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts of record, debts due to the King's Majesty, and of, from and against all other

that he and wife, and the said *J R*, some or one of them,

had good right to convey,

for quiet enjoyment,

free from incumbrances,

estates, troubles, charges, debts and incumbrances whatsoever, either already had, made, executed, occasioned or suffered, or hereafter to be had, made, executed or occasioned, or suffered by the said *R B* and *H A* his wife, or either of them, their or either of their heirs, or of or by any person or persons lawfully or equitably claiming or to claim by, from under, or in trust for them or any of them, or the said *J S* the testator, or any person or persons lawfully or equitably claiming or to claim under him; AND FURTHER, that they the said *R B* and *H A* his wife, and their heirs, and all and every other person and persons whomsoever having or claiming, or who shall, or may have or claim any estate, right, title, interest, inheritance, use, trust, property, claim or demand whatsoever either at law or in equity, of, in, to or out of the said messuage or tenement, and other hereditaments hereinbefore released or expressed and intended so to be, or any of them or any part thereof, by, from, under, or in trust for them the said *R B* and *H A* his wife, or either of them, their or either of their heirs, or by, from, or under the said *J S* the testator, shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said *W P*, his heirs, appointees or assigns, make, do, acknowledge, levy, suffer and execute, or cause and procure to be made, done, acknowledged, levied, suffered and executed all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, conveying and assuring of the said messuage or tenement, and other hereditaments hereinbefore released or expressed, and intended so to be, and every part thereof, with their appurtenances, TO THE USES hereinbefore limited, expressed or declared, as by the said *W P*, his heirs, appointees or assigns, or his or their counsel in the law shall be reasonably devised or advised and required. IN WITNESS, &c.

Conveyance to uses to bar dower.

and for further assurance.

No. XI.

Assignment of an outstanding Term in trust for a purchaser to attend the Inheritance (*a*).

Parties.

THIS INDENTURE made, &c. Between *A B* of (administrator of the goods and chattels, rights and credits, of *A O*, late of deceased) of the first part, *C D* of and *S* his wife, (who before her marriage with the said *C D* was the widow and relict of *R B*, late of deceased) of the second part, *E F* of of the third part, and *G H* of of the fourth part: WHEREAS (*b*) by indentures of lease and release bearing date respectively on or about the and days of the release being made, or expressed to be made between *E H* of the first part, *B G* of the second part, and *S W* of the third part; and by a common recovery suffered in pursuance of the same indenture of release in his Majesty's Court of *Common Pleas* at *Westminster*, in *Michaelmas* Term, in the year : ALL THAT messuage, &c. (the parcels) with their appurtenances, were for the considerations in the said indenture of release mentioned, limited, and assured, to the use of the said *S W*, his executors, administrators, and assigns, from the day before the day of the date of the said indenture of release for the term of 1000 years without impeachment of waste, with remainder to the use of the said *E H*, his heirs and assigns for ever, and in the said indenture of release was contained a proviso or condition for making void the said term of 1000 years on payment by the said *E H*, his heirs, executors, administrators, or assigns, unto the said *S W*, his executors, administrators, or assigns, of the sum of £60, with interest for the same, after the rate, on or at

Recites the deed creating the term.

(*a*) Vide Vol. I. p. 526.

(*b*) As to the propriety of the recitals contained in this precedent, see *Sugd.* on Vend. and Purch. 356.

the days or times, and in the manner therein mentioned and appointed for payment thereof respectively: AND WHEREAS by indentures of lease and release bearing date respectively on or about the and days of the release being made, or expressed to be made between the said *E H*, and *Elizabeth* his wife, of the first part, and *J O* of the other part, and by a fine *sur conuzance de droit come ceo*, &c. acknowledged and levied by the said *E H*, and *Elizabeth* his wife, before the justices of the said Court of *Common Pleas* at *Westminster*, in pursuance of a covenant in that behalf in the same indenture of release contained, the reversion, freehold and inheritance of and in the said messuage or tenement, pieces or parcels of land, and other hereditaments comprised in the said term of 1000 years, with their appurtenances, was conveyed and assured unto and to the use of the said *J O*, his heirs and assigns for ever: AND WHEREAS under and by virtue of certain *mesne* assignments and acts in the law, and ultimately by an indenture of assignment bearing date the day of and made, or expressed to be made, between *E W* of the first part, the said *E H* of the second part, the said *J O* of the third part, and the said *A O* of the fourth part; the said messuage or tenement, pieces or parcels of land, and other hereditaments, with the appurtenances, became vested in the said *A O* for all the residue of the said term of 1000 years, in trust nevertheless for the said *J O*, his heirs and assigns, and such other person or persons to whom the freehold and inheritance of the said premises should belong, and to protect the same from all *mesne* incumbrances, if any such there were: AND WHEREAS the said *J O* duly made and published his last will and testament in writing, bearing date on or about the day of and thereby gave and devised (among other hereditaments) the said messuage or tenements, pieces or parcels of land, and other hereditaments, comprised in the said term of 1000 years, with the appurtenances, by the description of all that his messuage, &c. (the description from the will) unto his wife *M O*, and her assigns for her life, and after her decease unto his daughter *H G*, the wife of *R G*, (then *H O*), and to her heirs and assigns for ever: AND WHEREAS the said *J O* departed this life shortly after the making of his

Assignment of a term in trust to attend the inheritance.

The deed conveying the fee to *J O* in trust for whom the term is assigned by the following deed.

The deed assigning the term to *A O* in trust to attend the inheritance of *J O*.

The will of *J O* devising the fee to *H G*.

The death of *J O*.

Assignment of a term in trust to attend the inheritance.

said will, without having in any manner revoked or altered the same: AND WHEREAS the said *M O* departed this life on or about the day of : AND WHEREAS by indentures of lease and release, bearing date respectively on or about the days of the release being made, or expressed to be made, between the said *R G*, and *H* his wife, of the one part, and the said *R B* of the other part; AND by a *fine sur conuzance de droit come ceo*, &c. acknowledged and levied by the said *R G*, and *H* his wife, before the justices of the said Court of *Common Pleas* at *Westminster*, in or as of *Trinity* Term, in the said year the said messuage or tenements, pieces or parcels of land, and other hereditaments, comprised in the said term of 1000 years, with their appurtenances, were for the considerations in the said indenture of release now in recital expressed, conveyed, and assured by the said *R G*, and *H* his wife, unto and to the use of the said *R B*, his heirs and assigns for ever: AND WHEREAS the said *R B* duly made and published his last will and testament in writing, bearing date on or about the day of and thereby devised all his real estate to his wife, the said *S D*, (then *S B*), and her assigns for her life, without impeachment of waste, with remainder to all his the said testator's children of that marriage in tail, with cross remainders in tail, between or among them, if more than one, with remainder to his niece *M*, the wife of *R S*, of, &c. her heirs and assigns for ever: AND WHEREAS the said *R B* departed this life in the month of without leaving any child by the said *S* his wife, and without having in any manner revoked or altered his said will: AND WHEREAS by indentures of lease and release, bearing date respectively on or about the day of 1800, the release being made, or expressed to be made, between the said *C D*, and *S* his wife, of the first part, the said *R S*, and *M* his wife, of the second part, and *W S* of the third part; and by a *fine sur conuzance de droit come ceo*, &c. acknowledged and levied by the said *C D*, and *S* his wife, and the said *R S*, and *M* his wife, before the justices of the said Court of *Common Pleas* at *Westminster*, in or as of *Easter* Term in the said year 1800, the said messuage or tenement, pieces or parcels of land, and other hereditaments, comprised in the said term of 1000 years, with the appur-

The death of *M O*.

A conveyance of the fee to *R B*.

The will of *R B*.

The death of *R B*.

A conveyance by the devisees of *R B*.

tenances, were for the considerations in the said indenture of release now in recital expressed, conveyed, and assured by the said *C D*, and *S* his wife, and *R S*, and *M* his wife, to the use of such person or persons for such estate and estates, interest and interests, and to and for such ends, intents, and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to such power of revocation and new appointment, and other powers, provisoes, limitations, declarations, and agreements, as the said *C D*, and *S* his wife, at any time or times thereafter by any deed or deeds, instrument or instruments in writing, to be by them sealed and delivered in the presence of and attested by two or more credible witnesses, should direct, limit, or appoint, and in default of and until such direction, limitation, or appointment to the use of the said *W S*, his heirs and assigns, in trust for the said *C D*, and *S* his wife, and their heirs and assigns for ever: AND WHEREAS by an indenture of lease and an indenture of appointment and release, the lease bearing date the day next before the day of the date of the appointment and release, and the appointment and release bearing even date with these presents, and made, or expressed to be made, between the said *C D*, and *S* his wife, of the first part, the said *W S* of the second part, the said *E F* of the third part, and *B A* of the fourth part; it is witnessed that in consideration of the sum of £ to the said *C D*, and *S* his wife, paid by the said *E F*, the said *C D*, and *S* his wife, in exercise and execution of the power or authority given or limited to them as hereinbefore is mentioned, and of every or any other power or authority enabling them in that behalf, did direct, limit, and appoint that the messuage or tenement, pieces or parcels of land, and other hereditaments, comprised in the said term of 1000 years, with the appurtenances, should henceforth go, remain, and be to the uses and upon and for the trusts, intents, and purposes, and under and subject to the power of appointment hereinafter limited, expressed, or declared of or concerning the same: And by the said indenture of appointment and release now in recital it is further witnessed that for the considerations therein and hereinbefore mentioned, and for a nominal consideration,

Assignment of a term in trust to attend the inheritance.

The conveyance of the fee of even date to the purchaser.

Assignment of a term in trust to attend the inheritance.

the said *W S*, at the request and by the direction of the said *C D*, and *S* his wife, (testified as therein mentioned), did bargain, sell, and release, and the said *C D*, and *S* his wife, did grant, release, and confirm unto the said *E F*, and his heirs, (amongst other hereditaments), the said messuage or tenements, pieces or parcels of land, and other hereditaments, comprised in the said term of 1000 years, with the appurtenances, to hold the same unto the said *E F*, and his heirs, to the uses upon and for the trusts, intents, and purposes, and under and subject to the power of appointment thereinafter limited, expressed, and declared of or concerning the same; and by the indenture of appointment and release now in recital it was agreed and declared that the direction, limitation, and appointment, and grant, releases and confirmation thereinbefore contained, and thereby respectively made as aforesaid, should respectively operate and enure, to such uses, upon such trusts, and to and for such intents and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations, as the said *E F* should by any deed or deeds, writing or writings, with or without power of revocation, and new appointment, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time direct, limit, or appoint, and for default of and until such direction, limitation, or appointment, to the use of the said *B A*, and his heirs, during the life of him the said *E F*, in trust for him the said *E F*, and his assigns, during his life, with remainder to the use of the said *E F*, his heirs and assigns for ever: AND WHEREAS the said *A O* departed this life on or about the day of intestate, and administration of his goods and chattels, rights, and credits was granted by the Prerogative Court of the Archbishop of *Canterbury* to the said *A B*, on or about the day of now last past: AND WHEREAS on the treaty for the purchase by the said *E F* it was agreed, that the said hereditaments comprised in the said term of 1000 years should be assigned to the said *G H*, his executors, administrators and assigns, for all the residue of the same term, upon the trusts hereinafter declared of or concerning the same: NOW THIS INDENTURE

The death of *A O* intestate, and the administration to *A B*.

The agreement as to the assignment of the term.

The assignment of the term.

WITNESSETH that in consideration of the premises, and for and in consideration of the sum of 10*s.* of lawful money of *Great Britain* to the said *A B* paid by the said *G H* at or before the sealing and delivery of these presents (the receipt of which is hereby acknowledged) he the said *A B*, at the request and by the direction of the said *C D*, and *S* his wife, and upon the nomination and appointment of the said *E F* (testified by their severally being parties to and sealing and delivering these presents), HATH bargained, sold, assigned, transferred, and set over, and by these presents DOTH bargain, &c. unto the said *G H*, his executors, administrators, and assigns, ALL AND SINGULAR the said messuage or tenement, pieces or parcels of land, hereditaments and premises, by the said in part recited indenture of the day of assigned to the said *A O*, his executors, administrators, and assigns for the residue then to come of the said term of 1000 years, as hereinbefore is mentioned, with their appurtenances; AND all the estate, right, title, interest, term and terms for years, property, possibility, claim, and demand whatsoever, both at law and in equity, of him the said *A B*, of, in, to, from, out of, and upon the same premises, and every of them, and every part or parcel thereof; TO HAVE AND TO HOLD the said messuage or tenement, pieces or parcels of land, hereditaments, and all and singular other the premises hereby assigned, or expressed and intended so to be, with their appurtenances, unto the said *G H*, his executors, administrators, and assigns, for and during all residue and remainder now to come and unexpired of the said term of 1000 years, IN TRUST nevertheless for the said *E F*, his heirs, appointees, and assigns, and to assign and dispose of the same from time to time, as he or they shall direct or appoint, and in the mean time upon trust to permit the residue and remainder of the said term of 1000 years to wait upon and attend the reversion, freehold, and inheritance of the same premises so as to be subservient thereunto, and to protect the same from all *mesne* incumbrances (if any such there be): AND the said *A B* doth for himself, his heirs, executors, and administrators, covenant and declare with and to the said *G H*, his executors, administrators, and assigns, by these presents, that he the said *A B* hath not at any time heretofore made,

Assignment of a term in trust to attend the inheritance.

HABENDUM.

The trusts of the term.

Covenant by the said *A B* that he had done nothing to incumber, &c.

Assignment of a term in trust to attend the inheritance.

done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof, the said hereditaments and premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part thereof are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever. IN WITNESS, &c.

No. XII.

A Settlement of the Wife's Property, with a limitation to the Husband until his Bankruptcy or Insolvency, &c. (a).

THIS INDENTURE made, &c. BETWEEN *A B* of merchant, of the first part, *C D* of spinster, of the second part, and *E F* of and *G H* of of the third part: WHEREAS the said *C D*, as sole executrix and residuary legatee named in the last will and testament of *T D* of (her late father deceased) is possessed of or entitled to the sum of £1000, payable on the day of next by the *Equitable Assurance* Office, upon a policy of assurance on the life of the said *T D*: AND the said *C D*, as such executrix and residuary legatee as aforesaid, is also entitled to the sum of £2500 *London Dock* Stock shares: AND WHEREAS a marriage hath been agreed upon, and is intended to be shortly had and solemnised between the said *A B* and *C D*: AND WHEREAS upon the treaty for the said intended marriage it was agreed, that the said sum of £1000 payable upon the aforesaid policy of assurance, and also the said sum of £2500 *London Dock* Stock shares should respectively be assigned and transferred to the said *E F* and *G H*, their executors, administrators, and assigns, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter mentioned, expressed, and declared of or concerning the same: AND WHEREAS, in pursuance and part performance of the said agreement she the said *C D*, with the privity and approbation of the said *A B*, (testified by his being a party to and sealing and delivering these presents), HATH transferred or caused to be transferred, in the books kept for that purpose by the *London Dock Company*, into the names of the said *E F* and *G H* the said sum of £2500 in the

Parties.

Recites the wife's title to money, due on a policy of assurance and to *London Dock* shares.

The intended marriage.

The agreement to settle the property,

and the transfer of the shares into the names of the trustees.

(a) Vide *supra*, p. 90.

Settlement, with a limitation to husband until bankruptcy.

joint stock of the said company, to be held by them upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed and declared, or referred to, of, or concerning the same: NOW THIS INDENTURE WITNESSETH, that in pursuance and further performance of the aforesaid agreement, and in consideration of the said intended marriage, and for and in consideration of the sum of 10*s.* of lawful money of *Great Britain* to the said *C D* in hand, well and truly paid by the said *E F* and *G H*, at or immediately before the sealing and delivering of these presents, (the receipt whereof is hereby acknowledged), she the said *C D*, with the privity and approbation of the said *A B*, (testified as aforesaid), HATH bargained, sold, assigned, transferred, and set over, and by these presents DOTH bargain, sell, assign, transfer, and set over unto the said *E F* and *G H*, their executors, administrators, and assigns, ALL THAT the said sum of £1000 so payable by the *Equitable Assurance* Office as hereinbefore is mentioned, together with the said policy of assurance and the full benefit thereof, AND all and every other sums and sum of money to be had or received thereby, AND all the right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of her the said *C D* in and to the same premises and every part thereof, TOGETHER with full power and authority to ask, demand, sue for, recover, and receive, and give effectual receipts and discharges for the same, and every part thereof respectively, in the name of her the said *C D*: TO HAVE, HOLD, RECEIVE, AND TAKE the said sum of £1000, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said *E F* and *G H*, their executors, administrators, and assigns, upon the trusts nevertheless, and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed and declared of and concerning the same: AND it is hereby agreed and declared between and by the parties to these presents, that the said *E F* and *G H*, their executors, administrators, and assigns, shall stand and be possessed of and interested in the said sum of £1000, and all and every other sums or sum of money due or payable upon the

ASSIGNMENT of the money due on the policy.

HABENDUM to the trustees

aforesaid policy of assurance, and also of and in the said sum of £2500 *London Dock* Stock shares, and the dividends, interest and produce thereof, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed or declared of or concerning the same respectively, (that is to say), IN TRUST for the said *C D*, her executors, administrators, and assigns, in the mean time and until the solemnization of the said marriage, and from and after the solemnization thereof, upon trust that they the said *E F* and *G H*, and the survivor of them, his executors, administrators, and assigns, do and shall call in and receive the said sum of £1000 when and so soon as the same shall become payable; and also all and every other sums or sum of money which shall or may be or become due or payable under or by virtue of the said policy of assurance, AND do and shall lay out and invest the same in their or his names or name in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of *Great Britain*, or at interest upon government or real securities in *England*, AND do and shall from time to time (with the consent in writing of the said *A B* and *C D*, his intended wife, during their joint lives, and after the decease of either of them, with the consent in writing of the survivor of them during his or her life, and after the decease of such survivor, at the discretion of the said trustees or trustee for the time being) alter, vary, and transpose the said stocks, funds, and securities as to them or him shall seem expedient, AND do and shall either permit and suffer the said sum of £2500 *London Dock* Stock shares, to remain in its actual state of investment, or do and shall at any time or times (with such consent or at such discretion as aforesaid) sell, transfer, or dispose of the same, or any part or parts thereof, for such price or prices as they or he shall think fit, AND do and shall (with such consent or at such discretion as aforesaid) lay out or invest the money to arise by or from such sale, transfer, or disposition, in their or his names or name in the purchase of a competent share or competent shares of any of the parliamentary stocks or funds of *Great Britain*, or at interest upon government or real securities in *England*; AND do and shall

Settlement, with a limitation to husband until bankruptcy.

upon trust to receive the money due upon the policy,

and to invest the same

upon government or real securities.

Power to vary securities (with consent of husband and wife)

and to permit the shares to remain as invested, or (with consent of husband and wife) to sell them, and to invest produce upon government or real securities,

with power to vary securities,

Settlement, with a limitation to husband until bankruptcy.

from time to time (with such consent or at such discretion as aforesaid) alter, vary, and transpose the same stocks, funds, and securities as to them or him shall seem meet; AND do and shall stand and be possessed of and interested in all and singular the said trust monies, stocks, funds, and securities, and the interest, dividends, and annual produce thereof respectively, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed and declared of and concerning the same (that is to say), UPON TRUST that they the said *E F* and *G H*, and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall from time to time pay the interest, dividends, and annual produce of all and singular the said trust monies, stocks, funds, and securities to, or permit the same to be received by the said *A B*, and his assigns, for and during the term of his natural life, or until he the said *A B* shall be found and declared a bankrupt, or shall become insolvent, or make and enter into any composition with his creditors, or shall take or accept the benefit of any act of parliament made or to be made for the relief of insolvent debtors: AND from and after the determination of the aforesaid trust hereinbefore declared for the benefit of the said *A B*, in case the same shall happen during the joint lives of the said *A B*, and *C D* his intended wife, do and shall pay and apply the interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities to such person or persons and for such intents and purposes as the said *C D* shall from time to time, notwithstanding her coverture by any writing or writings under her hand (but not so as to dispose of or affect the same in the way of *anticipation*) direct or appoint; AND in default of such direction or appointment into her own hands for her sole and separate use and benefit, independently and exclusively of the said *A B*, her intended husband, and without being in any wise subject to his debts, control, interference, or engagements, and the receipts of the said *C D*, or of her appointees, notwithstanding her coverture, to be from time to time sufficient discharges for the same; AND from and after the decease of the said *A B* (whether the aforesaid trust for his benefit shall have de-

And upon trust

to pay the interest and produce of all the trust monies, &c.

to husband for life, or until his bankruptcy or insolvency,

and then in case the same shall happen during the joint lives of husband and wife, to such persons as wife, by writing under her hand, shall appoint.

And in default of appointment, into her own hands for her separate use,

and her receipts to be sufficient discharges.

And after the death of husband,

termined in his lifetime or not) do and shall during the life of the said *C D* pay the interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities to, or permit the same to be received by her the said *C D* for her sole and separate use and benefit, exclusively of any future husband, and without being in any wise subject to his debts, control, or engagements; AND from and after the determination of the trust hereinbefore declared for the benefit of the said *A B* as aforesaid, (whether the same shall happen in his lifetime or not), and the decease of the said *C D*, do and shall stand and be possessed of and interested in all and singular the said trust monies, funds, stocks, and securities, and all the interest, dividends, and annual produce thereof respectively, IN TRUST for all and every or such one or more exclusively of the other or others of the children or child of the said *A B* by the said *C D*, his intended wife, with such provisions for their respective maintenance and education, and advancement at such age, day, or time, or respective ages, days, or times, and (if more than one) in such shares and proportions, and with such annual sums of money and limitations over for the benefit of the said children, or some or one of them, and upon such conditions and in such manner as the said *A B* and *C D* shall, during their joint lives, by any deed or deeds, instrument or instruments in writing, with or without power of revocation or new appointment, to be by them both sealed and delivered in the presence of and attested by two or more credible witnesses, direct or appoint, and in default of such joint direction or appointment, and so far as such joint direction or appointment shall not extend, then as the survivor of them the said *A B* and *C D* shall by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him or her sealed and delivered in the presence of and attested by two or more credible witnesses, or by his or her last will and testament in writing, or by any codicil or codicils thereto, to be by him or her signed and published in the presence of and attested by a like number of credible witnesses, from time to time direct, or appoint; AND in default of such direction or appointment, and so far as no such direction or appointment shall extend, IN TRUST for all and

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to the wife for her separate use.

And after determination of trust for husband's benefit and wife's decease,

in trust for such of their children as husband and wife shall by deed jointly appoint.

And in default of joint appointment, then as the survivor shall by deed or will appoint.

And in default of such appointment,

Settlement, with a limitation to husband until bankruptcy.

every the children and child of the said *A B* by the said *C D*, who being a son or sons shall attain the age of 21 years (*a*), or being a daughter or daughters shall attain that age or marry, to be divided between or among them, if more than one, in equal shares and proportions, and if there shall be but one such child the whole to be in trust for that one child: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, (that in default of any such direction or appointment as aforesaid to the contrary) no child or children, taking any part of the said trust monies, stocks, funds, or securities under or by virtue of any direction or appointment to be made by the said *A B* and *C D*, or the survivor of them, in pursuance of the powers or authorities hereinbefore in that behalf contained, or either of them, shall have or be entitled to any further or other share of and in that part of the same trust-monies, stocks, funds, or securities, of which no such direction or appointment shall have been made as aforesaid, without bringing his, her, or their appointed share or shares into hotchpot, and accounting for the same accordingly: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said *E F* and *G H*, and the survivor of them, and the executors, administrators, and assigns of such survivor, at any time or times after the decease of the survivor of them, the said *A B* and *C D*, or in the lifetime of them, or of the survivor of them, in case they, he, or she shall so direct by any writing or writings under their, his, or her hands or hand, to levy and raise any part or parts of the then expectant or then vested portion or portions of any child or children of the said intended marriage, under the trusts hereinbefore declared, not exceeding in the whole for any one such child one moiety or equal half part or share of his or her then expectant or then vested portion, and to pay and apply

in trust for all the children equally. Sons' shares payable at 21, and daughters' at that age or marriage; and if only one child the whole for that one child.

Children partially advanced to bring their shares into *hotchpot*.

Power to trustees to raise parts of childrens' expectant portions for their advancements.

(*a*) If it should be intended to provide for the issue of sons dying under 21, then the trusts should be in the following form: "In trust for all and every the children and child of the said *A B* by the said *C D*, who being a son or sons shall attain the age of 21 years, or die under that age, leaving issue living at his or their decease or respective deceases, or born in due time after, or being a daughter," &c.

the same for his, her, or their preferment, advancement, or benefit in such manner as the said *E F* and *G H*, or the survivor of them, or the executors, administrators, or assigns of such survivor shall in their or his discretion think fit: AND it is hereby agreed and declared between and by the parties to these presents, that the said *E F* and *G H*, and the survivor of them, and the executors, administrators, and assigns, of such survivor, do and shall, after the determination of the aforesaid trust for the benefit of the said *A B*, and the decease of the said *C D*, pay and apply the whole or such part as they the said *E F* and *G H*, or the survivor of them, or the executors, administrators, and assigns of such survivor shall think fit, of the interest, dividends, and annual produce of the portion or respective portions to which any child or children of the said intended marriage shall or may for the time being be entitled in expectancy under the trusts hereinbefore declared, for or towards the maintenance and education of such child or children respectively, in the mean time and until such his, her, or their portion or portions shall become payable; AND do and shall, during such suspense of absolute vesting as aforesaid, accumulate all the residue thereof (if any) in the way of compound interest, by investing the same, and all the resulting income and produce thereof from time to time in or upon any such stocks, funds, or securities as are hereinbefore mentioned, for the benefit of the person or persons who, under the trusts herein contained, shall become entitled to the principal fund from which the same respectively shall have proceeded: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents that if there shall be no child of the said intended marriage, who being a son shall attain the age of 21 years, or being a daughter shall attain that age or marry, then and in such case the said *E F* and *G H*, and the survivor of them, and the executors, administrators, or assigns of such survivor, shall from and after the determination of the aforesaid trust for the benefit of the said *A B*, and the decease of the said *C D*, and such default or failure of children of the said intended marriage as aforesaid, stand and be possessed of and interested in all and singular the said trust-monies, stocks, funds, and securities, or such part or parts thereof as shall not

Settlement, with a limitation to husband until bankruptcy.

And after determination of trust for husband's benefit and wife's decease, to pay the interest of childrens' portions for maintenance.

And to invest residue of interest, and all resulting produce of trust-monies for the purpose of accumulation.

If no child, to attain a vested interest,

Settlement, with a limitation to husband until bankruptcy.

have been vested or been applied under any of the trusts, powers, or authorities hereinbefore declared or contained, upon the trusts hereinafter declared of or concerning the same, (that is to say), if the said *C D* shall survive the said *A B*, IN TRUST for her the said *C D*, her executors, administrators, and assigns, but if the said *C D* shall die in the lifetime of the said *A B*, then in trust for such person or persons and for such intents and purposes as the said *C D*, notwithstanding her coverture, shall by her last will and testament in writing, or any codicil or codicils thereto, or any writing or writings in the nature of or purporting to be a will or codicil, direct or appoint; and in default of such direction or appointment, and so far as no such direction or appointment shall extend, in trust for the person or persons, who, under the statute for the distribution of the effects of intestates, would upon the decease of the said *C D* become entitled to her personal estate if she the said *C D* had died without having married and intestate, and such persons, if more than one, to take in the shares in which they would have become entitled to such personal estate after the determination of the aforesaid trust, for the benefit of the said *A B*, on the decease of the said *C D*: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful to and for the said *E F* and *G H*, or the survivor of them, or the executors, administrators, and assigns of such survivor, at any times or time during the lives or life of the said *A B* and *C D*, or the survivor of them, with their, his, or her consent and approbation in writing, to lay out and invest the said trust-monies, or any part or parts thereof, or the money to arise or be produced by the sale, transfer, or disposition of any stocks, funds, or securities in or upon which the said trust-monies, or any part or parts thereof, shall or may be laid out or invested in the purchase of freehold or copyhold manors, messuages, lands, tenements, or hereditaments in *England*, for an estate of inheritance, or any leasehold lands, messuages, or tenements in *England*, for any term of years (whereof not less than 60 years shall be to come and unexpired at the time of such purchase) to be conveyed, surrendered, or assigned to them the said *E F* and *G H*, or the

and if wife survive, then to her absolutely, but if husband survive, then in trust for such persons as wife shall by will appoint, and in default of appointment, in trust for her next of kin.

Power for trustees, with consent of husband and wife, to lay out trust-monies in the purchase of lands, &c.

survivor of them, their or his heirs, executors, administrators, or assigns, according to the nature of the estate or interest therein, UPON TRUST nevertheless (by and with the consent and approbation of the said *A B* and *C D*, or the survivor of them, to be signified by writing under their, his, or her hands or hand during the lifetime of them, or the survivor of them, and after the decease of the survivor of them, at the discretion and of the proper authority of the said *E F* and *G H*, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor), to sell and dispose of the said manors, messuages, lands, tenements, or hereditaments, which shall have been so purchased as aforesaid either by public sale or private contract, and in such manner as shall be deemed most convenient, and at the best price or prices that can be at the time of such sale reasonably had or gotten for the same, unto such person or persons who shall be willing to become the purchaser or purchasers thereof respectively; and upon trust to apply the money arising by such sale (after payment of the costs, charges, and expenses attending the same), upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisoes, agreements, and declarations (including the said powers of purchasing freehold, copyhold, and leasehold estates) as the money so raised and laid out in the purchase of such manors, messuages, lands, tenements, and hereditaments, was subject to before such purchase was made, or would have been subject to if the same had not been laid out therein; and also in trust in the mean time and until such manors, messuages, lands, tenements, or hereditaments shall be so sold, to apply the rents and profits thereof in such manner as the interest, dividends, and annual produce of the money laid out in the purchase thereof would have been applicable under the trusts hereinbefore declared, in case such purchase had not been made; it being hereby agreed and declared that the said manors, messuages, lands, tenements, or hereditaments so to be purchased by the trustees or the survivor of them, his heirs, executors, administrators, or assigns, under this present power as aforesaid, shall, when so purchased, be considered as money, and be subject to such and the same trusts in all respects as the money laid out in the purchase

Settlement, with a limitation to husband until bankruptcy.

Settlement, with a limitation to husband until bankruptcy.

thereof was subject to before such purchase was made, or would have been subject to if the same had not been laid out: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said *E F* and *G H*, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, for any sum or sums of money payable to them or him, under or by virtue of these presents, or in or about the execution of any of the trusts or powers hereinbefore contained, shall be sufficient and effectual discharges for the same, or so much thereof respectively as in such receipt or receipts shall be expressed, or acknowledged to be received, and that the person or persons to whom the same shall be given, his, her, or their heirs, executors, administrators, or assigns, shall not be afterwards answerable or accountable for any loss, misapplication, or nonapplication, or be in any wise obliged or concerned to see to the application of the money therein mentioned and acknowledged to be received:

Declaration that the receipts of the trustees shall be effectual discharges.

Power to appoint new trustees.

PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that if the said trustees, in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them, or any of them, as hereinafter is mentioned, shall happen to die, or be desirous of being discharged of and from, or refuse, or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed, or discharged, then and in such case and when and so often as the same shall happen, it shall and may be lawful to and for the said *A B* and *C D*, his intended wife, or the survivor of them, or the executors or administrators of such survivor by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by them, him, or her in the presence of and attested by two or more credible witnesses, from time to time to nominate, substitute, or appoint any other person or persons to be trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees shall be no-

minated and appointed as aforesaid, all the trust estates, monies, and premises which shall then be vested in the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon, with all convenient speed, conveyed, assigned, and transferred in such sort and manner and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates, monies, and premises respectively, and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates, monies, and premises then in such new trustees only, upon the same trusts as are hereinbefore declared of and concerning the same trust estates, monies, and premises respectively, (the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse, decline, or become incapable to act as aforesaid) or such of them as shall or may be then subsisting and capable of taking effect, and that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on, and execution of the trusts to which he or they shall be so appointed in conjunction with the other then surviving or continuing trustee or trustees of the same trust estates, monies, and premises respectively if there shall be any such continuing trustee or trustees, if not then by himself or themselves as fully and effectually, and with all the same power and powers, authority and authorities of consent, approbation, discretion, calling in, laying out, and investing, giving and signing receipts and effectual indemnifications and discharges to purchasers, mortgagees, or others, and all other powers and authorities whatsoever, to all intents, effects, constructions, and purposes whatsoever, as if he or they had been originally in and by these presents nominated trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, and as the trustee or trustees in these presents named, his or their heirs, executors, or administrators, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done, under and by virtue of these

Settlement, with a limitation to husband until bankruptcy.

Settlement, with a limitation to husband until bankruptcy.

presents, if then living and continuing to act in the trusts hereby reposed in them or him, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: PROVIDED ALWAYS, and it is hereby declared, that the said several trustees hereby nominated and appointed or to be appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the heirs, executors, administrators, and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies as they shall respectively receive by virtue of the trusts hereby in them reposed, notwithstanding his or their, or any of their giving or signing, or joining in giving or signing any receipt or receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects, or defaults of the other or others of them, but each and every of them only for his and their own acts, receipts, neglects, or defaults respectively; and that any one or more of them shall not be answerable or accountable for any banker, broker, or other person with whom, or in whose hands, any part of the said trust monies shall or may be deposited or lodged for safe custody, or otherwise, in the execution of the trusts hereinbefore mentioned; and that they or any of them shall not be answerable or accountable for the insufficiency or deficiency of any security or securities, stocks or funds, in or upon which the said trust monies or any part thereof shall be placed out or invested, nor for any other misfortune, loss, or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful default respectively; and also that it shall and may be lawful to and for them the said trustees in these presents named, and such future trustee or trustees to be appointed as aforesaid, and every or any of them, their and every of their heirs, executors, and assigns, by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain and reimburse himself and themselves respectively, and also to allow to his and their co-trustee and co-trustees all costs, charges, damages, and expenses which they or any of them shall or may suffer, sustain, expend, disburse, be at, or be put unto, in or about the execution of the aforesaid trusts, or in relation thereunto. IN WITNESS, &c.

Clause to indemnify the trustees.

No. XIII.

Surrender of a Lease for Lives by a married Woman, without a Fine, under the Statute 29 Geo. II. *c.* 31. (*a*).

TO ALL TO WHOM THESE PRESENTS SHALL COME,

A B of and *C* his wife, (before her marriage *C D*, spinster), send greeting: WHEREAS the Warden and Scholars of by an indenture of lease under their common seal, bearing date the day of did grant, demise, and lease unto the said *C B* (then *C D*, spinster), all that messuage &c. (the parcels), to hold the same, with the appurtenances, unto the said *C B*, her heirs and assigns, from the day of for and during the natural lives of *E F*, *G H*, and *I K*, and the life of the survivor or longer liver of them, at and under the yearly rents, and subject to the covenants and agreements therein reserved and contained, and on the part of the tenant or lessee to be paid, observed, and performed: AND WHEREAS the said *E F* hath departed this life: AND WHEREAS the said *A B*, and *C* his wife, being desirous of obtaining a renewal of the aforesaid lease in consequence of the death of the said *E F*, have applied to and requested the said Warden and Scholars to grant a new lease of the said demised premises, and which the said Warden and Scholars have agreed to do upon having the said recited indenture of lease, and the premises thereby demised, surrendered and given up in manner hereinafter mentioned; AND WHEREAS by an order of the high Court of *Chancery*, bearing date the day of and made on the petition of the said *A B*, and *C*, now his wife, it is ordered, (here recite the order): NOW THESE PRESENTS WITNESS that in pursuance of the aforesaid agreement, and in obedience to the aforesaid order, and by virtue of the aforesaid act of parliament, mentioned in and referred to in the said

Parties.

Recites, the lease intended to be surrendered.

The death of one of the lives, the application, and agreement to renew,

and the order of the Court of *Chancery*, directing the surrender.

(*a*) Vide *supra*, p. 108.

Surrender of a lease by wife, under statute 29 Geo. II. *c.* 31.

order, and for and in consideration of the sum of 10*s.* a piece of lawful money of *Great Britain* to the said *A B*, and *C* his wife, paid by the said Warden and Scholars at or immediately before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged); they the said *A B*, and *C* his wife,

Husband and wife surrender

HAVE and each of them HATH surrendered and yielded up, and by this present deed DO and each of them DOTH surrender

the demised premises, and

and yield up unto the said Warden and Scholars, the said messuage or tenement and premises hereinbefore described, and comprised in the aforesaid in part recited indenture of lease, with the appurtenances,

the lease,

AND also the said recited indenture of

to the Warden and Scholars,

lease, AND all the estate, right, title, interest, claim, and demand whatsoever of them the said *A B*, and *C* his wife, or either of them, of, in, to, and out of the same premises, and

to the end that the subsisting estate and interest therein may merge in the inheritance.

every part thereof, TO THE END that all the subsisting estate and interest under the said indenture of lease of and in the said demised premises, may merge and be extinguished in the inheritance of the same premises,

And to the intent, that a new lease may be granted pursuant to the order.

and TO THE INTENT and IN CONFIDENCE that the said Warden and Scholars shall and do grant a new lease of the same premises, pursuant to the aforesaid order. IN WITNESS, &c,

No. XIV.

Settlement of real Estate for the separate Use of a married Woman (*a*).

THIS INDENTURE made the day of in the year of our Lord 1820, BETWEEN *E H* of of the first part, *A B* of , and *C D* of of the second part, and *T I* of and *S* his wife (late *S H*, the mother of the said *E H*) of the third part, WITNESSETH, that in consideration of the natural love and affection which the said *E H* hath and beareth for his mother the said *S I*, and for and in consideration of the sum of 10*s*. of lawful money of *Great Britain* to the said *E H* in hand well and truly paid by the said *A B* and *C D*, at or before the sealing and delivering of these presents (the receipt whereof is hereby acknowledged), he the said *E H*, with the privity and approbation of the said *T I* and *S* his wife (testified by their being parties to, and sealing and delivering of these present), HATH granted, bargained, sold, aliened, released and confirmed, and by these presents DOTH grant, bargain, sell, alien, release and confirm unto the said *A B* and *C D* (in their actual possession, now being by virtue of a bargain and sale to them thereof made, in consideration of 5*s*. by the said *E H*, by indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and to their heirs, ALL, &c. (the parcels), together with all and singular houses, outhouses, edifices, buildings, barns, stables, coachhouses, cottages, yards, gardens, orchards, backsides, tofts, lands, meadows, pastures, commons, common of pasture, common of turbary, mines, minerals, quarries, furzes, trees, woods, underwoods,

Parties.

The consideration.

The settlor grants and releases, &c.

(reference to lease for a year).

Parcels and general words.

(*a*) See *supra*, p. 152.

Settlement of real estate to separate use of a married woman.

coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the said messuages or tenements, lands, hereditaments and premises belonging, or in anywise appertaining, or with the same or any of them respectively now or at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken or known as part, parcel or member of them or any part of them, or appurtenant thereunto, with their and every of their appurtenances; AND the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits of all and singular the said messuages or tenements, lands, hereditaments and premises hereby granted and released, or intended so to be; AND all the estate, right, title, interest, inheritance, use, trust, property, claim and demand whatsoever, both at law and in equity, of him the said *E H*, of, in and to the same premises, and every part and parcel thereof, TO HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments, and all and singular other the premises hereinbefore granted and released, or expressed and intended so to be, with their appurtenances, unto the said *A B* and *C D*, and their heirs, TO SUCH USES, upon such trusts, and to and for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as the said *S I*, notwithstanding her coverture, shall by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time, direct, limit or appoint; and for default of, and until such direction, limitation or appointment, and so far as any such direction, limitation or appointment shall not extend to the use of the said *A B* and *C D*, their heirs and assigns, during the joint lives of the said *T I* and *S* his wife, in trust, to collect, get in and receive the rents, issues and profits of the several hereditaments and premises hereinbefore granted and released, or expressed and intended so to be, as and when the same shall become payable, and to pay the same to such person or persons, and for such intents and purposes as the said *S I* shall from

HABENDUM.

To the releasees to such uses as the wife shall by deed appoint,

and for default of appointment, to the use of the releasees during joint lives of husband and wife, in trust to receive the rents,

and pay the same to such persons as wife shall by any writing appoint,

time to time, notwithstanding her coverture, by any writing or writings under her hand (but so as not to dispose of or affect the same by way of sale, mortgage, charge or otherwise, in the way of anticipation), direct or appoint; or in default of such direction or appointment, into her own hands for her sole and separate use and benefit, independently and exclusively of her husband the said *T I*, and without being in anywise subject to his debts, control, interference or engagements, and the receipts of the said *S I* or of her appointees, notwithstanding her coverture, to be from time to time sufficient discharges for the same; and if the said *S I* shall survive the said *T I*, then immediately after the decease of the said *T I* to the use of the said *S I*, her heirs and assigns for ever; but if the said *S I* shall die in the lifetime of the said *T I*, then to such uses, upon such trusts, and for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as the said *S I*, notwithstanding her coverture, shall by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be respectively by her signed and published in the presence of and attested by three or more credible witnesses, direct, limit or appoint; and in default of such direction, limitation or appointment, and so far as any such direction, limitation or appointment shall not extend, to the use of the right heirs of the said *S I* for ever: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to the presents, that the receipt or receipts in writing of the said *A B* and *C D* (*see the form of this declaration in precedent No.* ix. *p.* 45): PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that if the said trustees in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them, or any of them, as hereinafter is mentioned, shall happen to die or be desirous of being discharged of and from, or refuse or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed or discharged, then and in such case, and when and so often as the same shall happen, it shall and

Settlement of real estate to separate use of a married woman.

and in default of such appointment, into her own hands for her separate use.

Receipts of wife to be sufficient discharges,

and if wife shall survive, then after decease of husband to the use of the wife in fee, but if husband shall survive, then to such uses as wife shall by will appoint,

and in default of such appointment, to wife's right heirs.

Declaration that the receipts of trustees shall be sufficient discharges.

Power to appoint new trustees.

Settlement of real estate to separate use of a married woman.

may be lawful to and for the said *S I*, notwithstanding her coverture, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, from time to time to nominate, substitute or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust estates and premises which shall then be vested in the trustee or trustees so dying, or desiring to be discharged, or refusing, declining or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall be thereupon, with all convenient speed, conveyed and assured in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates and premises respectively, and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates and premises, then in such new trustees only, to the same uses and upon the same trusts as are hereinbefore declared of and concerning the same trust estates and premises respectively (the trustee or trustees whereof shall so die, or be desirous of being discharged, or refuse, decline, or become incapable to act as aforesaid), or such of them as shall or may be then subsisting and capable of taking effect; and that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on, and execution of the trusts to which he or they shall be so appointed, in conjunction with the other then surviving or continuing trustee or trustees of the same trust estates and premises respectively, if there shall be any such continuing trustee or trustees, if not, then by himself or themselves as fully and effectually and with all the same power and powers, authority and authorities whatsoever, to all intents, effects, constructions, and purposes whatsoever, as if he or they had been originally in and by these presents nominated trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, and

as the trustee or trustees in these presents named, his or their heirs, executors, or administrators, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done under and by virtue of these presents if then living, and continuing to act in the trusts hereby reposed in them or him, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding: PROVIDED ALWAYS, and it is hereby declared that the said several trustees hereby nominated and appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the heirs, executors, administrators, and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their, or any of their giving or signing, or joining in giving or signing any receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects, or defaults of the other or others of them, but each and every of them, only for his and their own acts, receipts, neglects, or defaults respectively; and that any one or more of them shall not be answerable or accountable for any misfortune, loss, or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful default respectively: and also that it shall and may be lawful to and for them the said trustees, in these presents named, and such future trustee or trustees to be appointed as aforesaid, and every or any of them, their and every of their heirs, executors, administrators, and assigns, by and out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain to and reimburse himself and themselves respectively, and also to allow to his and their co-trustee or co-trustees all costs, charges, damages, and expenses which they or any of them shall or may suffer, sustain, expend, disburse, be at, or be put unto, in, or about the execution of the aforesaid trusts, or in relation thereunto: AND the said *E H*, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and agree to and

Settlement of real estate to separate use of a married woman.

Clause to reimburse and indemnify the trustees.

Covenants by settlor,

Settlement of real estate to separate use of a married woman.

with the said *A B* and *C D*, their heirs and assigns, by these presents in manner following, (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever by him the said *E H*, or any of his ancestors, made, done, executed, committed, or willingly or knowingly suffered to the contrary, he the said *E H* now hath in himself good right, full power, and lawful and absolute authority to grant, release, convey, settle, and assure the said messuages or tenements, lands and hereditaments hereinbefore by these presents granted and released by him as aforesaid, with their respective appurtenances, to the several uses, upon the several trusts, and for the several intents and purposes, and under and subject to the several powers, provisoes, declarations, limitations, and agreements hereinbefore limited, expressed, declared, and contained of and concerning the same respectively, according to the true intent and meaning of these presents: And that all and singular the same messuages or tenements, lands, hereditaments, and premises shall and may from time to time, and at all times hereafter remain, continue, and be to and for the several uses, intents, and purposes, upon the trusts, and under and subject to the several powers, provisoes, declarations, and agreements hereinbefore limited, expressed, declared, and contained of and concerning the same respectively, and shall and may be peaceably and quietly held and enjoyed accordingly, without any let, suit, trouble, denial, eviction, ejection, disturbance, interruption, claim, or demand whatsoever, of or by him the said *E H*, or his heirs, or any other person or persons lawfully or equitably claiming or to claim by, from or under, or in trust for him or them, or by, from, or under any of his ancestors; And that free and clear, and freely and clearly acquitted, exonerated, released, and for ever discharged or otherwise by him the said *E H*, or his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all, and all manner of former and other gifts, grants, bargains, sales, mortgages, jointures, dowers, right and title of dower, uses, intails, trusts, wills, reversions, or remainders in the crown, statutes merchant, and of the staple, recognizances, judgments, extents, elegits, executions, rents, arrears of rent, annuities, legacies, sum and sums of

that he hath good right to convey, &c.

For quiet enjoyment.

Free from incumbrances.

money, yearly payments, forfeitures, re-entry, cause and causes of forfeiture and re-entry, debts of record, debts due to the King's Majesty, and of, from, and against all other estates, titles, troubles, charges, and incumbrances whatsoever, either already had, made, committed, done, executed, occasioned, or suffered, or hereafter to be had, made, committed, done, executed, occasioned, or suffered by him the said *E H*, or his heirs, or any other person or persons lawfully claiming or to claim by, from, or under, or in trust for him or them, or any of them: *Settlement of real estate to separate use of a married woman.*

AND FURTHER, that he the said *E H*, and his heirs, and all and every other persons or person having or claiming, or who shall or may have or claim any estate, right, title, interest, trust, property, claim, and demand whatsoever, either at law or in equity, of, in, to, or out of the said hereditaments and premises hereby granted and released, or expressed and intended so to be, or any of them, or any part thereof, by, from, or under, or in trust for him, or by, from, or under any of his ancestors, shall and will from time to time, and at all times hereafter, at the request of the said *S I*, but at the proper costs and charges of the said *T I* and *S I*, or one of them, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all and every such further and other acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely conveying, or assuring of the said messuages or tenements, lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, and every of them, and every part and parcel thereof, with their and every of their appurtenances, to the uses, upon the trusts, for the intents and purposes, and under and subject to the powers, provisoes, agreements, and declarations hereinbefore limited, declared, and contained of and concerning the same, according to the true intent and meaning of these presents, be the same by fine or fines, common recovery or common recoveries, or any other matter of record or not of record, or otherwise howsoever, as by the said *S I*, or any of the parties interested in the premises, their or any of their counsel in the law, shall be reasonably devised or advised and required, so as such further as- *And for further assurance.*

Settlement of real estate to separate use of a married woman.

surances contain or imply in them no further or other covenant or warranty than against the person or persons who shall be required to make and execute the same, and his, her, or their heirs, executors, or administrators, acts and deeds respectively, and so as that the party or parties who shall be required to make and execute such further assurance or assurances, be not compelled or compellable to travel or go from the place or places of his or their respective abodes for the doing thereof. IN WITNESS, &c.

No. XV.

Gift by Will of Personal Estate to the separate use of a Married Woman (a).

AND I do hereby give and bequeath to the said *E F*, and *G H*, in case my sister *C D*, the wife of the Reverend *H D*, of , shall survive me, but not otherwise, the sum of £500 sterling, UPON TRUST, that they, the said *E F*, and *G H*, and the survivor of them, and the executors, administrators, or assigns of such survivor, do and shall lay out and invest the same in their, or his names or name, in the purchase of a competent share or competent shares of the parliamentary stocks or public funds of *Great Britain*, or at interest upon government or real securities in *England*: AND do and shall (with the consent in writing of my said sister during her life), alter, vary, and transpose the said stocks, funds, and securities, at their or his discretion; AND do and shall during the joint lives of the said *H D*, and *C D* his wife, pay and apply the interest, dividends, and annual produce of the said sum of £500, and the stocks, funds, or securities, in or upon which the same shall be laid out or invested, to such person or persons, and for such intents and purposes as my said sister, *C D*, shall from time to time, notwithstanding her coverture, by any writing or writings under her hand (but not so as to dispose of or affect the same by any sale, mortgage, or charge, or otherwise, in the way of anticipation) direct or appoint; AND in default of such direction or appointment, into her own hands, for her sole and separate use and benefit, independently and exclusively of the said *H D*, her husband, and without being in any wise subject to his debts, control, interference, or engagements: And the receipts of my said sister or of her appointees, notwithstanding her coverture,

Bequest to trustees in case testator's sister shall survive him, of £500 upon trust,

to invest on government or real securities,

with power to vary securities, and during joint lives of husband and wife to pay interest and dividends to such persons as wife shall by writing appoint, but not by anticipation,

and in default into her own hands for her separate use.

Receipts of wife to be sufficient discharges.

(a) See *supra*, p. 152.

Gift by will of personal estate to wife's separate use.

to be from time to time sufficient discharges for the same: AND UPON FURTHER TRUST, that if the said *H D* shall depart this life in the lifetime of the said *C*, his wife, then and in such case, the said *E F* and *G H*, or the survivor of them, or the executors, administrators, or assigns of such survivor, do and shall, immediately after the decease of the said *H D*, pay, transfer, or assign, the said sum of £500, and the stocks, funds, or securities, in or upon which the same shall be laid out or invested, and the interest, dividends, and annual produce thereof, to the said *C D*, her executors, administrators, or assigns, for her or their proper use and benefit, and without being subject to any disposition of or by the said *H D*, during his lifetime: AND UPON FURTHER TRUST, that if the said *C D* shall depart this life in the lifetime of the said *H D*, her husband, then, and in such case, the said *E F* and *G H*, and the survivor of them, and the executors, administrators, and assigns of such survivor, do and shall, from and after the decease of the said *C D*, stand and be possessed of and interested in the said sum of £500, and the stocks, funds, or securities, in or upon which the same shall be laid out or invested, and the interest, dividends and annual produce thereof, upon and for such trusts, intents and purposes, as the said *C D*, notwithstanding her coverture, shall by her last will and testament in writing, or any codicil or codicils thereto, or any writing or writings in the nature of, or purporting to be, a will or codicil, direct or appoint: And in default of such direction or appointment, and so far as no such direction or appointment shall extend, IN TRUST for all and every the children and child of the said *C D*, by her present or any future husband, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age, or marry, to be divided between or among them, if more than one, in equal shares and proportions, and if there shall be but one such child, the whole to be in trust for that one child: AND if there shall be no child, in trust for the person or persons who, under the statute for the distribution of the effects of intestates, would, at the decease of the said *C D*, have become entitled to her personal estate if the said *H D* had died during her lifetime, and she the said *C D* had died unmarried and intestate.

And if wife survive, then to transfer trust monies, &c. to wife absolutely.

But if husband be the survivor,

then trustees to stand possessed of trust monies, &c.

as wife shall by will appoint,

and in default of appointment in trust for wife's children by present or a husband.

but if no child, then in trust for wife's next of kin.

No. XVI.

A Settlement, before Marriage, to the Wife's separate use, of real and personal Estates to which she was then entitled, and to which she might become entitled during the Coverture (*a*).

THIS INDENTURE made the day of , in the year of our Lord 1820, BETWEEN *C D* of , spinster, (the heir at law and only next of kin of *W D* of , her late father deceased) of the first part, *A B* of esquire of the second part, and *E F* of *G H* of and *I K* of of the third part: WHEREAS the said *W D*, deceased, being at the time of his death seised or entitled for an estate of inheritance in fee simple in possession of or to the messuages or tenements, lands, and other hereditaments, hereinafter particularly described, and intended to be hereby granted and released, with their appurtenances, and being possessed of or entitled to a considerable personal estate, on or about the day of departed this life intestate, leaving the said *C D* his heir at law and only next of kin: AND WHEREAS by an indenture of lease, bearing date on or about the day of , and made or expressed to be made between the dean and chapter of of the one part, and the said *C D* of the other part: For the considerations therein mentioned, the said dean and chapter did grant and demise unto the said *C D* all that messuage, &c. (the parcels) with the appurtenances, to hold the same unto the said *C D*, her heirs and assigns, for and during the lives of the three several persons therein respectively named (and all of whom are still living), at, under, and subject to the rent, covenants, and agreements therein reserved and contained, and which on the tenants' or lessees' part are and ought to be paid, observed, and kept: AND WHEREAS by an indenture of lease, bearing date on or about the of , and made or expressed to be made between the said dean and chapter of the one part, and the said *C D* of the other part (*recites a*

Parties.

Recites the death of wife's father intestate, and her title to his freehold

and personal estates.

Also her title to two leases for lives,

(*a*) See *ante*, p. 180.

Ante-nuptial settlement of wife's real and personal estates to her separate use.

lease of other hereditaments to the same effect as the foregoing lease is recited): AND WHEREAS by a bond or obligation in writing, bearing date on or about the day of under the respective hands and seals of *W S* and *H T*, a sum of £4000 is secured to be paid by the said *W S* and *H T*, and their respective heirs, executors, and administrators, unto the said *C D*, her heirs, executors, administrators, and assigns, on the day of , which will be in the year of our Lord 1828, with interest thereon after the rate of 5 *per cent. per annum*, payable at the times therein mentioned: AND WHEREAS the said *C D* is also entitled to a sum of £2400 3 *per cent.* consolidated bank annuities: AND WHEREAS a marriage hath been agreed upon, and is intended shortly to be had and solemnised between the said *C D* and *A B*: AND WHEREAS upon the treaty for the said intended marriage, it was agreed that all and singular the real and personal estate of or to which the said *C D* is seised or entitled as hereinbefore is mentioned, and all other the real and personal property to which she the said *C D* now is, or which at any time during the said intended coverture she, or the said *A B* in her right, shall or may become entitled, should be settled and assured, so as that the same respectively during the continuance of such coverture might be for the separate use and absolute disposal of her the said *C D*: AND that, in consideration of such settlement she the said *C D* should relinquish in manner hereinafter mentioned all the right and title which she would otherwise in consequence of her marriage with the said *A B* have or derive to dower, freebench, or thirds out of the real estates of the said *A B*, or to any part or share of the personal estate of the said *A B*, under the statutes made for distribution of the estates of intestates: AND WHEREAS, in pursuance and part performance of the said agreement, she the said *C D* hath this day transferred the said sum of £2400 3 *per cent.* consolidated bank annuities into the names of the said *E F*, *G H*, and *I K*, in the books kept by the Governor and Company of the Bank of England for entering the transfers of the same stock, as they the said *E F*, *G H*, and *I K* do hereby respectively admit and acknowledge: NOW THIS INDENTURE WITNESSETH, that in pursuance and further performance of the said agreement, and

to money secured by bond,

and to money in the funds.

Also recites the intended marriage,

and the agreement to settle wife's property to her separate use and disposal.

And in consideration thereof wife agrees to relinquish all right and title in husband's real and personal estates,

The transfer of the stock into the trustees' names.

in consideration of the said intended marriage, and also for and in consideration of the sum of 10*s.* of lawful money of Great Britain to the said *C D* in hand, well and truly paid by the said *E F*, *G H*, and *I K*, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), she the said *C D*, with the privity and approbation of the said *A B* (testified by his being a party to and sealing and delivering these presents), HATH granted, bargained, sold, aliened, released, and confirmed, and by these presents DOTH grant, bargain, sell, alien, release, and confirm unto the said *E F*, *G H*, and *I K* (in their actual possession, &c. *see the form of this recital in precedent, No.* 14), and their heirs, ALL THOSE MESSUAGES, &c. (the parcels) together with all and singular houses, outhouses, &c. (*see the general words in precedent, No.* 14): AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the said messuages or tenements, lands, hereditaments, and premises, hereby granted and released, or intended so to be: AND all the estate, right, title, interest, inheritance, reversion, use, trust, property, claim, and demand whatsoever, both at law and in equity, of her the said *C D*, of, in and to the same premises and every part and parcel thereof: TO HAVE AND TO HOLD the said messuages or tenements, lands, hereditaments, and all and singular other the premises hereinbefore granted and released, or expressed and intended so to be, with their and every of their appurtenances, unto the said *E F*, *G H*, and *I K*, their heirs and assigns, to the use of the said *E F*, *G H*, and *I K*, their heirs and assigns for ever: UPON THE TRUSTS, nevertheless, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements and declarations hereinafter mentioned, expressed and declared of and concerning the same (that is to say), IN TRUST for the said *C D*, her heirs and assigns, until the said intended marriage shall be had and solemnised, and from and immediately after the solemnisation thereof, UPON TRUST that they the said *E F*, *G H*, and *I K*, and the survivors and survivor of them, and the heirs and assigns of such survivor, Do and shall during the joint lives of the said *C D* and *A B* convey and dispose of the said messuages or tenements, lands, and other heredita-

Ante-nuptial settlement of wife's real and personal estates to her separate use.

The wife grants and releases the freehold hereditaments. (reference to lease for a year).

HABENDUM.

to the use of the releasees

upon trust.

for the wife until marriage, and afterwards,

Ante-nuptial settlement of wife's real and personal estates to her separate use.

ments hereinbefore granted and released, or expressed and intended so to be, or any of them, or any part or parts thereof, to such person or persons for such estate or estates, interest or interests, and for such intents and purposes, and in such manner as she the said *C D* (notwithstanding her coverture) by any deed or deeds, instrument or instruments in writing, with or without powers of revocation and new appointment, to be by her sealed and delivered in the presence of and to be attested by two or more credible witnesses, or by her last will and testament in writing, or by a codicil thereto, or any writing or writings in the nature of a will and codicil to be by her signed and published in the presence of and to be attested by three or more credible witnesses, shall from time to time direct or appoint; and in default of and until such direction or appointment, or so far as any such direction or appointment, if incomplete, shall not extend, do and shall, during the joint lives of the said *A B* and *C D*, collect, get in, and receive the rents, issues, and profits of the said messuages or tenements, lands, hereditaments, and premises hereinbefore granted and released, or expressed and intended so to be, as and when the same respectively shall become payable; AND do and shall pay the same to, or permit and suffer the same to be received by such person or persons, and for such intents and purposes as she the said *C D*, by any note or notes in writing under her own hand, shall, from time to time, either as the same shall respectively become due, *or in the way of anticipation* direct or appoint, and in default of such direction or appointment, do and shall pay the same rents, issues, and profits into the proper hands of or permit the same to be received by the said *C D*, and to the intent that the said messuages or tenements, lands, and other hereditaments, and the rents, issues, and profits of the same may, during the said intended coverture, be for the sole, separate, and particular use and benefit, and at the sole and uncontrolled disposal of the said *C D*, notwithstanding her said intended coverture, and may not be subject to the debts, control, forfeiture, or engagements of the said *A B*, her said intended husband: AND it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts of the said *C D*, or of

To convey and dispose of the same, as she by deed or will shall appoint,

And in default,

to receive the rents and pay the same,

as wife by any note in writing under her hand shall direct, and in default of such direction,

into her own hands for her separate use.

Wife's receipts to be sufficient discharges.

such person or persons as she shall from time to time appoint to receive the said rents, issues, and profits, in manner aforesaid, and her and their receipt and receipts only shall be a good and sufficient discharge, and good and effectual discharges to the said *E F*, *G H*, and *I K*, and the survivor or survivors of them, and the heirs and assigns of such survivor, or to the person or persons paying the said rents, issues, and profits for so much thereof as in such receipt or receipts shall be expressed or acknowledged to be received: AND UPON THIS FURTHER TRUST, that if the said *C D* shall happen to survive the said *A B*, the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, and the heirs and assigns of such survivor, do and shall, immediately after the decease of the said *A B*, so dying in the lifetime of the said *C D*, convey the said messuages or tenements, lands and other hereditaments, or such part or parts of the same as shall then remain undisposed of, under the trusts and powers hereinbefore contained, with their appurtenances, unto the said *C D*, her heirs and assigns, for his and her own proper use and benefit; but if the said *C D* shall depart this life in the lifetime of the said *A B*, then that the said *E F*, *G H*, and *I K*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall, immediately after the decease of the said *C D*, so dying in the lifetime of the said *A B*, convey the said messuages or tenements, lands, and other hereditaments, or such part or parts of the same as shall then remain undisposed of, under the trusts and powers hereinbefore contained, with their appurtenances, unto the right heirs of the said *C D* for ever, for a legal estate of inheritance: AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance and further performance of the said agreement, and for the considerations aforesaid, and also for and in consideration of the further sum of 10*s.* of like lawful money to the said *C D* in hand well and truly paid by the said *E F*, *G H*, and *I K*, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged): She, the said *C D*, with the like privity and approbation of the said *A B* (testified as aforesaid), HATH granted, bargained, sold, and released, and by these presents DOTH grant, bargain, sell, and release, unto the said *E F*, *G H*, and *I K*, in their actual possession

Ante-nuptial settlement of wife's real and personal estates to her separate use.

And upon further trust if wife shall survive,

then immediately after decease of husband to convey the hereditaments

to wife in fee,

but if husband should be the survivor,

then after decease of wife to convey hereditaments

unto the wife's right heirs.

The wife grants and releases the leasehold hereditaments.

Ante-nuptial settlement of wife's real and personal estates to her separate use

(*see the form of this recital in the first operative part of this precedent*), and to their heirs, the said messuage or tenements, lands, and all and singular, other the premises comprised in, and granted, demised, or otherwise assured by the hereinbefore in part recited indenture of lease, of the day of , with their appurtenances: AND ALSO the said pieces or parcels of land, hereditaments, and all and singular other the premises comprised in and demised by the hereinbefore in part recited indenture of lease, of the day of , with their appurtenances: AND all the estate, right, title, interest, term, and terms for years, right and benefit of renewal, property, possibility, claim, and demand whatsoever, both at law and in equity, of her the said *C D*, of, in, to, or out of the same premises respectively, and every of them, and every part and parcel thereof respectively, together with the said several indentures of lease, and all benefit and advantage thereof respectively: TO HAVE AND TO HOLD the said several messuages or tenements, lands, hereditaments, and all and singular other the premises hereinbefore lastly released or expressed and intended so to be, with their and every of their appurtenances, unto the said *E F*, *G H*, and *I K*, their heirs and assigns; TO THE USE of them the said *E F*, *G H*, and *I K*, their heirs and assigns, for and during the lives of the several persons respectively, upon or for whose lives or life, by virtue of the said several indentures, or any renewed lease or leases of the same leasehold premises respectively, or any of them, the same leasehold premises respectively, or any of them now are, or hereafter shall be held, subject nevertheless to the payment of the rents and to the performance and observance of the several covenants and agreements, by and in the said several indentures of lease of the same premises respectively reserved and contained, and which are or ought henceforth, on the tenant's or lessee's part, to be paid, observed and kept: BUT UPON THE TRUSTS, nevertheless, and for such intents and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations as are hereinbefore mentioned, expressed, and declared, of and concerning the freehold hereditaments and premises hereinbefore granted and released, or as near thereto as the nature and quality of the said estates respectively will admit of:

HABENDUM.

To the use of the releasees

upon the trusts declared of the freehold hereditaments.

Ante-nuptial settlement of wife's real and personal estates to her separate use.

AND UPON THIS FURTHER TRUST, that in the mean time, and until the said leasehold hereditaments and premises shall be absolutely sold or disposed of under the trusts or powers hereinbefore contained, they the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, and the heirs and assigns of such survivor, do and shall, by and out of the rents and profits of the same leasehold premises yearly and every year, and at all other times, duly pay, satisfy, and perform the several rents, reservations, covenants, and agreements, which are respectively reserved and contained in the said several indentures of lease, and which in and by any renewed lease or leases to be from time to time renewed and taken of the same premises respectively shall be reserved and contained, and which, on the part of the tenants or lessees thereof, are or shall or ought to be paid or performed: AND UPON THIS FURTHER TRUST, that the said *E F*, *G H*, and *I K*, and the survivors and survivor of them, and the heirs and assigns of such survivor, do and shall renew the said leases from time to time as occasion shall require: AND for that purpose do and shall make such surrenders of the hereditaments so to be renewed as shall be requested, and necessary or proper in that behalf, AND for that purpose do and shall, by and out of the rents and profits of the same leasehold premises respectively, or by mortgage thereof, or of any part thereof, or by such other ways or means as they or he shall think proper, raise such sum or sums of money as shall be sufficient to pay and satisfy the several fines, fees, and other necessary charges and expenses of such renewal; AND do and shall pay and apply the money so to be levied or raised, in or towards the effecting such renewal or renewals accordingly: AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance and further preformance of the said agreement, and for the considerations aforesaid, and for and in consideration of the sum of 10*s.* of like lawful money to the said *C D* in hand, well and truly paid by the said *E F*, *G H*, and *I K*, as hereinbefore is mentioned (the receipt whereof is hereby acknowledged), she, the said *C D*, with the like privity and approbation of the said *A B* (testified as aforesaid), HATH bargained, sold, assigned, transferred and set over, and by these presents DOTH bargain, sell, assign, transfer, and set over unto the said *E F*, *G H*, and

And upon further trust, until sale of the leasehold hereditaments, out of the rents to pay and satisfy the rents and covenants in the leases.

And upon further trust to renew the leases,

and out of the rents, or by mortgage, to raise money to pay the fines on such renewals.

Assignment by the wife of the money

Ante-nuptial settlement of wife's real and personal estates to her separate use.

I K, their executors, administrators, and assigns, ALL that the said sum of £4000, secured as hereinbefore is mentioned, and all interest now due or henceforth to grow due for the same, together with the said in part recited bond or obligation, and the full benefit thereof, AND all sums of money and personal estate whatsoever, to which the said *C D* now is or hereafter may be or become intitled as next of kin of the said *W D*, her late father, under the statutes made for distribution of the estates of intestates, or by the custom of the province of York, or otherwise howsoever: AND all the right, title, interest, property, possibility, claim and demand whatsoever, both at law and in equity, of her the said *C D*, of, in, or to the same premises respectively, or any part thereof respectively, WITH full power and authority to ask, sue for, recover and receive, and to give effectual receipts and discharges for the said monies, and interest, and premises, hereinbefore assigned, and every or any part thereof respectively: TO HAVE, HOLD, receive, and take the said sum of £4000, and interest, and the said sums of money, personal estate, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, unto the said *E F*, *G H*, and *I K*, their executors, administrators, and assigns UPON THE TRUSTS, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed, or declared, and contained of and concerning the same: AND it is hereby agreed and declared, between and by the parties to these presents, that the said *E F*, *G H*, and *I K*, and the survivors and survivor of them, and the executors, administrators or assigns of such survivor, do and shall stand and be possessed of and interested in the said sum of £4000 and interest; AND of and in the said sums of money, and personal estate, to which she the said *C D* now is or hereafter may be or become intitled as aforesaid: AND ALSO of and in the said sum of £2400 £3 per cent. consolidated bank annuities, so transferred into the names of them the said *E F*, *G H*, and *I K*, as hereinbefore is mentioned; and of and in the dividends, interest and annual produce thereof upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed or declared of or concerning the same respec-

due on the bond, and other her personal estate, to which she is intitled as next of kin of her father or otherwise.

HABENDUM.

Declaration that the trustees shall stand possessed of the assigned premises and of the stock transferred into their names.

In trust for the wife until the marriage,

tively (that is to say), IN TRUST for the said *C D*, her executors, administrators, and assigns, in the mean time, and until the said intended marriage shall be had and solemnized, and from and immediately after the solemnization thereof: UPON TRUST that they the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, and the executors, administrators, and assigns of such survivor, do and shall pay, transfer, assign, or otherwise dispose of all and singular the trust monies, stocks, funds, securities, and premises so respectively assigned and transferred, as hereinbefore is mentioned, and the interest, dividends, and annual produce thereof respectively, and every or any part or parts of the same respectively, to such person or persons, for such intents and purposes, and in such manner as she the said *C D*, notwithstanding her said intended coverture, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by her sealed and delivered in the presence of, and to be attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the name of or purporting to be a will or codicil, shall from time to time direct or appoint; and in default of and until such direction or appointment, and so far as any such direction or appointment if incomplete shall not extend, UPON THIS FURTHER TRUST, that they the said *E F*, *G H*, and *I K*, and the survivors and survivor of them, and the executors, administrators and assigns of such survivor Do and shall call in and receive the said sum of £4000, and interest; and also all and every the sums and sum of money and personal estate whatsoever to which the said *C D* is or may be so intitled as hereinbefore is mentioned, as and when the same respectively shall become due and payable: AND do and shall sell and dispose of such part of the said personal estate as shall not consist of money, for such price or prices as they or he shall think fit: AND do and shall (with the consent in writing of the said *C D*), lay out or invest the money to arise by or from such sale or disposition; and also the said sum of £4000, and interest, and the said several sums or sum of money, as and when the same shall be received in their or his names or name, in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England: AND

Ante-nuptial settlement of wife's real and personal estates to her separate use.

and afterwards upon trust, to pay or assign the same or any part or parts thereof,

as wife shall by deed appoint,

and in default of appointment, upon further trust,

to call in the money due on the bond and personal estate

to sell such part of the personal estate not consisting of money,

and invest produce with the other trust monies,

on government or real securities,

Ante-nuptial settlement of wife's real and personal estates to her separate use.

do and shall from time to time (with such consent as aforesaid), alter, vary, and transfer the same stocks, funds, and securities, as to them or him shall seem meet: And do and shall either permit and suffer the said sum of £2400 3 per cent consolidated Bank Annuities, to remain in its actual state of investment, or do and shall (at any time or times, with such consent as aforesaid), sell, transfer, or dispose of the same or any part or parts thereof, for such price or prices as they or he shall think fit: And do and shall (with such consent as aforesaid), lay out and invest the money to arise by or from such sale, transfer, or disposition, in their or his names or name, in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England: And do and shall from time to time (with such consent as aforesaid), alter, vary, and transfer the same stocks, funds, and securities, as to them or him shall seem meet: And do and shall stand and be possessed of and interested in all and singular the said trust monies, stocks, funds, securities, and premises hereinbefore respectively mentioned; and the interest, dividends, and annual produce thereof respectively upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed, declared, or contained, of or concerning the same (that is to say), upon trust that they, the said *E F*, *G H*, and *I K*, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall during the joint lives of the said *C D* and *A B*, pay the interest, dividends, and annual produce of the said several trust monies, stocks, funds, securities, and premises, as and when the same shall respectively become due, and be received into the proper hands of the said *C D*, or into the hands of such person or persons, and for such intents and purposes as she the said *C D*, notwithstanding her said intended coverture, by any note or writing under her hand shall from time to time direct or appoint, to the intent that the same may be for the sole and separate use and at the absolute and uncontroled disposal of the said *C D*, and may not be liable to the debts, control, forfeiture or engagements of the said *A B*, her said intended husband.

with power to vary the securities, and permit the stock transferred to remain as invested, or sell and transfer the same, and invest produce on like securities,

with power to vary such securities,

and to stand possessed of all the trust-monies, securities, and premises.

Upon trust,

to pay the interest and dividends, &c.

into wife's hands,

or as she by note or writing shall appoint.

For wife's separate use.

Ante-nuptial settlement of wife's real and personal estates to her separate use.

AND it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts of the said *C D*, or of her appointee or appointees, shall be a good and effectual discharge and good and effectual discharges for the said interest, dividends, and annual produce, or for so much thereof as in such receipt or receipts shall be expressed or acknowledged to be received: AND UPON THIS FURTHER TRUST that if the said *C D* shall survive the said *A B*, the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, and the executors, administrators, or assigns of such survivor, do and shall immediately upon the decease of the said *A B*, so dying in the lifetime of the said *C D*, pay, transfer, and assign the said trust monies, stocks, funds, securities, and premises, and the interest, dividends, and annual produce, or such part or parts of the same respectively as shall be then unappointed and undisposed of, after answering the trusts and purposes hereinbefore contained, unto the said *C D*, her executors, administrators, or assigns. BUT if the said *C D* shall depart this life in the lifetime of the said *A B*, then do and shall pay, assign, and transfer the said trust monies, stocks, funds, securities, and premises, and the interest, dividends, and annual produce, or such part or parts thereof respectively as shall be then unapplied, unappointed, and undisposed of after answering the trusts and purposes hereinbefore contained, to the person or persons who under the statutes made for the distribution of the estates of intestates would then be intitled thereto in case the said *C D* had died unmarried and intestate: AND WHEREAS the said *C D* is possessed of ready money, and of household furniture, plate, linen, china, wine, and other effects, all or most of which are now in her house, at []: AND she is likewise possessed of jewels, trinkets, and other ornaments of her person and other effects: AND upon the treaty for the said marriage it was agreed that the same should, notwithstanding the said intended coverture, be retained by the said *C D* for her separate use, and be disposed of by her at her free will and pleasure as she should from time to time think proper. Now, THEREFORE, THIS INDENTURE FURTHER WITNESSETH that in pursuance of such agreement, and in consideration of the said intended marriage, he the said *A B*, for himself, his heirs,

Wife's receipts to be sufficient discharges;

and upon further trust if wife shall survive;

then upon husband's decease, to pay, transfer, and assign trust-monies, securities, and premises to wife absolutely.

But if husband should be the survivor,

then to pay, transfer, and assign trust-monies, securities, and premises, to wife's next of kin.

And recites that wife is possessed of ready money, household furniture, and other property.

And the agreement that such property should be retained by her for her separate use, and disposed of at her pleasure.

Ante-nuptial settlement of wife's real and personal estates to her separate use.

executors, and administrators, doth hereby covenant, promise, and agree to and with the said *E F*, *G H*, and *I K*, their executors, administrators, and assigns, that in case the said intended marriage shall take effect, he the said *A B*, his executors and administrators, shall and will permit and suffer the said *C D*, his said intended wife, from time to time and at all times thereafter, notwithstanding the said intended coverture, to have, use, retain, wear, and enjoy, to and for her sole and separate use and as her own separate property, and either in her lifetime or by her last will and testament in writing, or by any writing in the nature of her will, or any codicil thereto, to be signed by her own hand, to give away and dispose of to any person or persons whomsoever, all and every or any of the household furniture, plate, linen, china, wine, books, jewels, trinkets, and other ornaments of her person, sums of money, and effects whatsoever, which the said *C D* is now possessed of, as hereinbefore is mentioned; and all savings of the same, and all sums of money and effects whatsoever which may arise or be produced by any sale, disposition, or conversion of the same: And it is hereby further agreed and declared, and the said *A B* doth for himself, his heirs, executors, and administrators, further covenant, promise, and agree with and to the said *E F*, *G H*, and *I K*, their executors, administrators, and assigns, by these presents in manner following (that is to say), that if at any time during the said intended coverture any real or personal estate whatsoever shall descend or devolve to or vest in the said *C D*, or in any persons or person in trust for her, or to or in the said *A B* in her right, then and in that case and so often as the same should happen, he the said *A B* shall and will at the costs and charges of the said *C D*, make, do, and execute, or cause or procure to be made, done, and executed, or join or concur with the said *C D*, her heirs, executors, or administrators, in the making, doing, and executing of all such acts, deeds, conveyances, assignments, and assurances in the law whatsoever as shall be necessary and proper for conveying, assigning, assuring, and confirming the said real and personal estate in such manner as that (regard being had to the nature and quality of the same), the said real and personal estate shall and may be vested in the said *E F*, *G H*, and *I K*, their

COVENANT by husband to permit his wife to use and retain such property for her separate use,

and to dispose of the same by her will;

and all her savings.

FURTHER COVENANT by husband that if wife shall acquire any real or personal estates during the coverture, he will do all acts necessary for conveying and assigning the same to the trustees upon the trusts of the settlement.

heirs, executors, administrators, and assigns, upon such trusts, intents, and purposes as will correspond or best and nearest correspond with the trusts, intents, and purposes hereinbefore expressed and contained of and concerning the real and personal estate hereinbefore mentioned, and the trusts thereof hereinbefore declared: AND the said *A B* doth hereby for himself, his heirs, executors, and administrators covenant, promise, and agree with the said *E F*, *G H*, and *I K*, their executors, administrators, and assigns, that he the said *A B*, his heirs, executors, or administrators shall not nor will at any time or times prevent or obstruct the said *C D*, her heirs, appointees, executors, administrators, or assigns, from holding, enjoying, receiving, taking, and disposing of the said estates, monies, stocks, funds, securities, and premises hereinbefore mentioned, in the manner hereinbefore expressed, and according to the true intent and meaning of these presents: AND THAT if the said *C D* shall depart this life in the lifetime of the said *A B*, he the said *A B*, his heirs, executors, and administrators shall and will permit the will and codicils of the said *C D* to be proved by the executors or executor therein named: AND THAT if the said *C D* shall die intestate, then shall and will permit the administration of her effects to be granted to the person or persons who would be intitled to administer to her in case she the said *C D* had survived him the said *A B*: AND THAT he the said *A B*, his heirs, executors, and administrators shall and will from time to time, and at all times hereafter upon the request and at the proper costs and charges in the law of the said *C D*, her heirs, executors, administrators, or assigns, or of the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, or the heirs, executors, administrators, or assigns of such survivor, make, do and execute, or cause or procure to be made, done and executed all such further and other lawful and reasonable acts, deeds, assignments, conveyances and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, bargaining, selling, assigning, assuring and confirming the several estates, sums of money, stocks, funds, securities, rents, issues, profits, interests, dividends and annual produce, and other effects hereinbefore mentioned, and the trusts whereof are hereinbefore

Ante-nuptial settlement of wife's real and personal estates to her separate use.

And for quiet enjoyment.

And that if he should survive his wife to permit her will to be proved.

And if wife die intestate, to permit administration of her effects to be granted to her own next of kin.

And for further assurance.

Ante-nuptial settlement of wife's real and personal estates to her separate use.

declared, and every of them and every part of the same respectively unto the said *E F*, *G H*, and *I K*, their heirs, executors, administrators and assigns respectively, upon the trusts, intents and purposes hereinbefore mentioned and declared of and concerning the same respectively; and for the further and better enabling them the said *E F*, *G H*, and *I K*, their heirs, executors, administrators and assigns to carry the trusts hereby created into execution, as by the said *C D*, her heirs, executors, administrators or assigns, or by the said *E F*, *G H*, and *I K*, and the survivors or survivor of them, and the heirs, executors, administrators or assigns of such survivor, or his, her or their, or any of their counsel in the law shall be advised, devised, or required: AND THIS INDENTURE LASTLY WITNESSETH, that in consideration of the said intended marriage, and that the said real and personal estates of the said *C D* are hereby settled for her separate use, benefit and disposition, as hereinbefore is mentioned, it is hereby agreed and declared between and by the parties to these presents: AND the said *C D* doth hereby for herself, her heirs, executors and administrators covenant, promise and agree with and to the said *A B*, his heirs, executors, administrators and assigns; and also with and to the said *E F*, *G H*, and *I K*, their heirs, executors, administrators and assigns, that the settlement hereinbefore contained, and hereinbefore made of the real and personal estate of her the said *C D* shall be, and the said *C D* doth hereby accordingly accept the same for her jointure, and in lieu, bar, and in full satisfaction of the dower, thirds and free bench, and every other estate or right which at common law or by custom, or otherwise, the said *C D* might be intitled to or might claim from the real estate of the said *A B*; and also of every part and share which, if the said *C D* should survive the said *A B*, she, the said *C D*, might claim of or in his personal estate under any custom whatsoever, or under any statute made for the distribution of the estate of intestates: PROVIDED ALWAYS and it is hereby agreed and declared between and by the parties to these presents, that the receipt or receipts in writing of the said *E F*, *G H*, and *I K* (*see the form of this declaration in precedent*, No. IX.): PROVIDED ALWAYS and it is hereby agreed and declared between and by the said parties to these presents,

Covenant by wife to accept the settlement in bar of her dower, &c. and of her interest in her husband's personal estate.

Declaration that the receipts of trustees shall be sufficient discharges.

Power to appoint new trustees.

that if the said trustees in and by these presents nominated and appointed, or any future trustee or trustees to be appointed in the stead or place of them or any of them as hereinafter is mentioned, shall happen to die or be desirous of being discharged of and from, or refuse, or decline, or become incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed, or discharged; then and in such case, and when and so often as the same shall happen, it shall and may be lawful to and for the said *C D*, notwithstanding her coverture by any deed or deeds, instrument or instruments, in writing, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, from time to time to nominate, substitute or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid; and that when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust estates, monies and premises which shall then be vested in the trustee or trustees so dying, or desiring to be discharged, or refusing, declining or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees shall be thereupon, with all convenient speed, conveyed, assigned and transferred in such sort and manner, and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust estates, monies and premises respectively, and such new or other trustee or trustees, or if there shall be no continuing trustee or trustees of the same trust estates, monies and premises, then in such new trustees only, to the same uses and upon the same trusts as are hereinbefore declared of and concerning the same trust estates, monies and premises respectively (the trustee or trustees whereof shall so die or be desirous of being discharged, or refuse, decline or become incapable to act as aforesaid) or such of them as shall or may be then subsisting and capable of taking effect; And that every such new trustee or trustees shall and may in all things act and assist in the management, carrying on and execution of the trusts to which he or they shall be so appointed, in con-

Ante-nuptial settlement of wife's real and personal estates to her separate use.

Ante-nuptial settlement of wife's real and personal estates to her separate use.

junction with the other then surviving or continuing trustee or trustees of the same trust estates, monies and premises respectively, if there shall be any such continuing trustee or trustees, if not then by himself or themselves, as fully and effectually, and with all the same power and powers, authority and authorities, of consent, approbation, discretion, calling in, laying out, and investing, giving, and signing receipts, and effectual indemnifications and discharges to purchasers, mortgagees or others, and all other powers and authorities whatsoever, to all intents, effects, constructions and purposes whatsoever, as if he or they had been originally in and by these presents nominated trustees or trustee for the purposes for which such new trustee or trustees, and as the trustee or trustees in these presents named his or their heirs, executors or administrators, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do, or could or might have done, under and by virtue of these presents, if then living and continuing to act in the trusts hereby reposed in them or him, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding; PROVIDED ALWAYS, and it is hereby declared, that the said several trustees hereby nominated and appointed or to be appointed by virtue of the proviso last hereinbefore contained, and each and every of them, and the heirs, executors, administrators and assigns of them, each and every of them, shall be charged and chargeable respectively only for such monies, &c. (*see the form of this clause in precedent*, No. IX). IN WITNESS, &c.

Clause for indemnifying the trustees.

No. XVII.

Appointment of a married woman by Deed of settled property in favour of her husband, under a power reserved to her by marriage settlement (a).

THIS INDENTURE made, &c. BETWEEN *J W*, wife of *T W*, of &c. (before her marriage *J D*, spinster) of the one part, and the said *T W* of the other part: WHEREAS by indentures of lease and release bearing date respectively the days of the release being made or expressed to be made between the said *T W* of the first part, the said *J W* (then *J D*, spinster) of the second part, and *G H* and *W Y* of the third part (being the settlement made previously to and in contemplation of the marriage then intended, and which was soon afterwards duly had and solemnized between the said *T W* and *J* his wife); it is witnessed, that in consideration of the said then intended marriage, and for other considerations therein mentioned, the said *J W* did grant, release and confirm unto the said *G H* and *W Y* and their heirs all that messuage, &c. (the parcels) with their appurtenances, to hold the same unto the said *G H* and *W Y* their heirs and assigns, to the uses upon and for the intents and purposes in the said indenture of release now in recital, expressed and declared of and concerning the same, and in part hereinafter mentioned (that is to say) to the use of such person or persons, and to and for such estate and estates, and with, under and subject to such powers, provisoes, agreements, and declarations as the said *J W*; notwithstanding her coverture, and whether covert or sole, by any deeds or deed, writings or writing, to be by her sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be her last will and testament to be by her executed as therein mentioned, should direct, limit, or appoint: AND WHEREAS by an indenture bearing date on, &c.

Parties.

Recites the settlement creating the power.

A deed creating a

(a) See *ante*, p. 222.

Wife's appointment by deed.

and made, or expressed to be made, between the said *T W*, and *J* his wife, of the one part, and *P S*, spinster, of the other part; it is witnessed that in consideration of the sum of £350 paid to the said *T W*, and *J* his wife, by the said *P S*, she the said *J W*, with the privity and approbation of the said *T W*, (testified as therein mentioned), by force and virtue, and in exercise and execution of the power and authority given and reserved to her the said *J W* in and by the aforesaid in part recited indenture of release as aforesaid, and of every or any other power or authority enabling her in that behalf, did direct, limit, and appoint that the said messuage or tenement, and all and singular other the premises comprised in the aforesaid in part recited indenture of release should go, remain, and be, and that the said *G H* and *W Y*, their heirs and assigns, should thenceforth stand and be seised of and in the same premises, to the use of the said *P S*, her executors, administrators, and assigns, for the term of 1000 years, thenceforth next ensuing, without impeachment of waste, subject nevertheless to the proviso and agreement in the said indenture now in recital contained, for making void the same term on payment by the said *T W*, and *J* his wife, or either of them, their or either of their heirs, executors, or administrators, or the person or persons who for the time being should be entitled to the reversion, freehold, or inheritance of the said premises, comprised in the said term of 1000 years, immediately expectant upon the determination of the same term, unto the said *P S*, her executors, administrators, or assigns, of the sum of £350, with interest for the same, after the rate and at the time in the said indenture now in recital mentioned and appointed for payment of the same respectively: AND WHEREAS the said principal sum of £350, with an arrear of interest thereon, still remains due and owing to the said *P S*, or her executors, administrators, or assigns, upon or by virtue of the aforesaid security: AND WHEREAS the said *J W* is desirous to make an appointment of the reversion, freehold, and inheritance of the said messuage or tenement and premises comprised in the aforesaid in part recited indenture of release in favour or for the benefit of the said *T W* her husband, his heirs, and assigns, from and after the decease of her the said *J W* (subject nevertheless to the said mortgage thereof

term for securing a mortgage debt.

That the mortgage debt and interest are due.

The wife's desire to appoint the reversion in favour of her husband after her decease.

so made as aforesaid): NOW THIS INDENTURE WITNESSETH, that for the purpose of effectuating the end, intent, and purpose aforesaid, she the said *J W*, by force and virtue, and in exercise and execution of the power and authority so given or limited to her the said *J W* by the aforesaid in part recited indenture of release as hereinbefore mentioned and of every or any other power or authority in any wise enabling her in this behalf, with the privity of the said *T W*, her husband, (testified by his being a party to and executing these presents), HATH directed, limited, and appointed, and by this present deed or writing, sealed and delivered by her the said *J W* in the presence of and attested by the two credible persons whose names are intended to be hereupon indorsed as witnesses to the sealing and delivery of these presents by the said *J W*, DOTH direct, limit, and appoint, THAT the said messuage or tenement, and all and singular other the premises comprised in the aforesaid in part recited indenture of release, and by her limited in mortgage to the said *P S*, her executors, administrators, and assigns as aforesaid, with their appurtenances, shall, from and after the decease of her the said *J W*, go, remain, and be, and that the said *G H* and *W Y*, their heirs and assigns, shall thenceforth stand and be seised of and in the same premises, to the use of the said *T W*, his heirs and assigns for ever, (subject nevertheless to the said mortgage thereof so made to the said *P S*, her executors, administrators, and assigns, for the term of 1000 years, for securing to her and them the payment of the principal sum of £350, and interest for the same, as hereinbefore mentioned): IN WITNESS, &c.

Wife's appointment by deed.

THE APPOINTMENT.

No. XVIII.

The Will of a married Woman under a Power reserved to her by Settlement (*a*).

THIS IS THE LAST WILL AND TESTAMENT of me *A*, wife of *B*, of, &c. made by virtue of the power of appointment reserved to me in manner hereinafter mentioned: WHEREAS under the settlement executed previously to and in contemplation of my marriage, a certain sum in the 3 *per cent.* consolidated bank annuities, or in some other of the parliamentary stocks or public funds of *Great Britain*, together with a leasehold messuage situate in the county of *Middlesex*, and one-fourth part or share of certain policies of assurance on the life of my father, and on the life or lives of some other person or persons, are vested in *E F* of and *G H* of upon certain trusts for the benefit of my said husband *B* for his life, and after his death, for my benefit during my life, and after the death of the survivor of us, for the benefit of the issue of our marriage, and with power for me, in case of my dying in the lifetime of my said husband, and in default of my having any child by my said husband, who should become entitled to the said trust monies and premises under the trusts aforesaid, to appoint and dispose of the same by any will, or writing in the nature of a will, to be executed as therein mentioned, subject to the life interest of my said husband therein. Now I the said *A*, in execution of the said power of appointment, and of every or any other power enabling me in this behalf, do by this my last will, or writing in the nature of a will, signed and published by me in the presence of and attested by three credible persons, whose names are hereunder subscribed as witnesses, direct and appoint; THAT from and after the decease of my said husband, and such default or failure of children of our said marriage as aforesaid, the said capital stock, and also

Recital of the settlement creating the power.

Appointment of trust monies after the death of the husband and failure of issue.

(*a*) See *ante*, p. 222.

the said leasehold messuages with the appurtenances, and also the said fourth part or share of the said several policies of assurance, and of the monies to be received by virtue of the same respectively, and all other the trust monies and premises, which by virtue of my said marriage settlement, I have power to dispose of, bequeath, or appoint, shall respectively go, remain, and be, and the said *E F* and *G H*, their executors, administrators, or assigns, shall stand and be possessed of and interested in the same, in trust for my said husband *B*, his executors, administrators, and assigns, and I give and bequeath the same to him and them accordingly, and I do hereby nominate and appoint my said husband *B* sole executor of this my last will and testament. IN WITNESS, &c.

Wife's appointment by will.

To trustees for husband absolutely.

No. XIX.

Deed of Separation (*a*).

Parties.

THIS INDENTURE made the day of in the year, &c. BETWEEN *A B* of of the first part, *H B* of (the son of the said *A B*) of the second part, *C B* of (the wife of the said *H B*, but now living separate and apart from him) of the third part, *E F* of and *G F* of (which said *E F* and *G F* are the brothers of the said *C B*) of the fourth part, and *I K* of and *L M* of of the fifth part: WHEREAS unhappy differences have arisen and do subsist between the said *H B*, and *C* his wife, and in consequence whereof they have agreed to live separate and apart from each other: AND WHEREAS by indentures of lease and release, bearing date respectively the days of 1816, the release being made, or expressed to be made, between *H L* of the first part, the said *A B* of the second part, the said *H B* of the third part, *B R* of the fourth part, *C O* of the fifth part, *R D* of the sixth part, *H C* of the seventh part, and *T C* of the eighth part; and by two common recoveries duly suffered by the said *H L*, *A B*, and *H B*, in or as of *Hilary* Term, in the said year 1816, in pursuance of the said indenture of release, and by force of a declaration of the uses of the said common recoveries in the same indenture contained; and also by a deed poll or instrument in writing, under the hands and seals of the said *H L*, *A B*, and *H B*, bearing date on or about the day of and a deed poll or instrument in writing, under the hands and seals of the said *A B* and *H B*, bearing date the day of one undivided moiety of and in the manors or lordships, towns, messuages, lands, tenements, and hereditaments, and the entirety of the rectories or advowson hereinafter particularly

Recites that husband and wife have agreed to live separate, and the conveyances under which the husband and his father derive their power hereinafter exercised to charge the hereditaments hereinafter appointed,

(*a*) See *ante*, p. 279, and see a more simple deed of separation in the following precedent, No. 20.

mentioned were conveyed, limited, and assured, and do now stand settled, subject, and liable to such uses, upon and for such trusts, intents and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations as the said *A B* and *H B* shall by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by both of them sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time or at any time direct, limit, or appoint: *Deed of separation.*

AND WHEREAS upon the treaty for the said separation, it was agreed between the said parties hereto, that the said *H B* should by his bond or obligation in writing, secure unto the said *C B* for her separate use, one annuity or clear yearly sum of £300 during the joint lives of her and the said *H B*; and that the said *A B* and *H B* should charge the said undivided moiety, and the said rectories and advowsons, with an annuity or yearly rent charge of £500, for the benefit of the said *C B*, to commence from the death of the said *A B*, if the said *C B* shall then be living, and whether the said *H B* shall then be living or not, and also, that the said *E F* and *G H* should enter into the covenant hereinafter contained: AND WHEREAS in pursuance and part performance of the aforesaid agreement in his behalf, he the said *H B* hath by his bond or obligation in writing under his hand and seal, bearing even date with these presents, become bound unto the said *E F* and *G H* in the penal sum of £ with a condition thereunder written, for making the same void on payment by the said *H B* unto the said *C B*, for her separate use and benefit, of one annuity or clear yearly sum of £300, during the joint lives of him and the said *C B*, or to such person or persons as she by any writing under her hand shall from time to time, notwithstanding her coverture, direct or appoint, on or at the days or times therein particularly mentioned and appointed for payment thereof: NOW THIS INDENTURE WITNESSETH that in pursuance and further performance of the said agreement on the part of the said *H B*, he the said *H B*, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree with and to the said *E F* and *G F*, their executors, administrators, and assigns, by these presents in manner fol-

and the husband's agreement to secure to wife by bond an annuity for her separate use,

and to charge the estates of husband and his father with a rent charge for the benefit of the wife, and the agreement of wife's brothers, to indemnify husband against her debts.

Also recites the husband's bond of even date.

Husband covenants,

Deed of separation.

lowing (that is to say), that notwithstanding the marriage that was had and solemnized between the said *H B* and *C B* his wife, it shall and may be lawful to and for the said *C B*, from time to time, and at all times hereafter, to live separate and apart from him the said *H B*, in such sort and manner as if she were sole and unmarried, and that he the said *H B* shall not, nor will compel her to cohabit or live with him, by any ecclesiastical censure or proceedings, or otherwise howsoever;

that wife may live separate from him,

and that she, the said *C B*, shall be absolutely, and to all intents and purposes whatsoever, freed and discharged from the power, command, will, restraint, authority, and government of him the said *H B*; and that he shall not, nor will at any time hereafter, by any cause, or under any pretence whatsoever, sue or prosecute any person or persons for receiving, harbouring, protecting, or assisting the said *C B*, or ill treat, or use, or offer any violence, force, or restraint, to the person of her the said *C B*, or molest, interrupt, or disturb her in her way of living, or in her liberty or freedom of going to or staying in or returning from such place or places as she shall think fit; AND ALSO, that it shall and may be lawful to and for the said *C B*, from henceforth to have, take, and enjoy to her own separate and absolute use, notwithstanding her coverture, all such jewels, plate, furniture, clothes, linen, wearing apparel, and ornaments, articles and things whatsoever, as now are or which at any time or times hereafter, shall be hers or reputed hers, or which she shall save from the provision hereby made for her separate use, and from time to time by deed or will, or from hand to hand, to sell, give away, or dispose of the same; and that if the said *C B* shall depart this life in the lifetime of the said *H B*, he, the said *H B*, will permit and suffer *the last will and testament* of the said *C B*, or any writing in the nature of or purporting to be her last will and testament, and codicil or codicils thereto, to be proved in the proper ecclesiastical court, by the person or persons to be therein named or appointed the executor or executors thereof; and that if the said *C B* shall not name or appoint an executor or executors of her said will, or such executor or executors shall die in her lifetime, or refuse to prove her said will or to act in the executorship thereof, or if the said *C B* shall die intestate, as to all or any part of the said premises hereinbefore

and that he will not molest her,

that she may have and enjoy to her separate use, her jewels, clothes, and ornaments, &c. and her savings, and by deed or will sell or dispose of the same, and if she shall die before him, to permit her will to be proved,

or if she die intestate, administration

declared or directed to be for her separate use or disposal, he the said *H B*, shall and will permit *administration* of the goods, rights, and credits of the said *C B*, to be taken out by the person or persons who would be intitled thereto if the said *C B* had not married the said *H B*, and shall and will permit and suffer the said personal estate and effects of the said *C B*, or so much thereof of which she shall die intestate, to be distributed among the persons, and in the manner among whom and in which the same by the statute for the distribution of the effects of intestates would be distributable if the said *C B* had not married the said *H B*: AND THAT all such estates, real and personal, as during the joint lives of the said *H B* and *C B* his wife, shall descend or come to, or devolve upon, or be given, or devised, or bequeathed, or conveyed to, or in trust for her the said *C B*, or to, or for, or upon him the said *H B*, in right of the said *C B* his wife, shall be holden, enjoyed, sold, given away, devised, bequeathed, and disposed of by the said *C B*, her heirs, executors, administrators, and assigns respectively, according to the several natures and qualities thereof respectively, in such manner as she or they shall think fit, without being subject to the debts, control, claims, custody, or intermeddling of him the said *H B*, as if she, the said *C B*, had not married the said *H B*: And also, that he, the said *H B*, shall and will, for that purpose, make, do, and execute, all such acts, deeds, devices, and assurances in the law whatsoever, for confirming and corroborating these presents, and every clause, matter, and thing herein contained, as by the said *E F* and *G F*, their executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required: AND THIS INDENTURE ALSO WITNESSETH, that in pursuance and performance of the aforesaid agreement on the part of the said *A B* and *H B*, and pursuant to, and by force and virtue, and in exercise and execution of the powers or authorities to them for this purpose given or limited by the hereinbefore in part recited indenture of release, of the day of 1816, and the said deeds poll, of the day of , day of , and day of , or any of them, and every or any other power or authority to them reserved, in and by any other deed or indenture, or in any wise enabling them, or either of them in this be-

Deed of separation.

to be taken out by her next of kin.

And that all real and personal estate acquired by the wife during the coverture, shall be enjoyed and disposed of by her as she shall think fit, without being subject to his debts or interference.

And that he will do all acts necessary for confirming these presents as shall be required of him.

And in exercise of their power the father and husband

Deed of separation.

half, they, the said *A B* and *H B* do, and each of them doth by this present deed or instrument, in writing, by both of them sealed and delivered in the presence of and attested by two credible persons whose names are intended to be hereupon indorsed as witnesses attesting the sealing and delivery of these presents by them, the said *A B* and *H B* respectively, direct, limit, and appoint: THAT ALL, that the undivided moiety, or equal half part or share, which they ore ither of them have or hath power to appoint as aforesaid, of and in all that and those the manor or lordship of, &c. (the parcels), and all and other the manors or lordships, towns, messuages, lands, tenements, rents, and hereditaments, and parts or shares of manors or lordships, towns, messuages, lands, tenements, rents, and hereditaments, in the said counties of and or either of them, over which the said *A B* and *H B*, or either of them, have or hath any power enabling them or him in this behalf, together with all and singular houses, outhouses, edifices, buildings, barns, stables, coach-houses, cottages, dovecots, yards, gardens, orchards, backsides, tofts, lands, meadows, pastures, heaths, moors, marshes, wastes, waste-grounds, folds, foldcourses, and liberty of foldage, feedings, parks, warrens, commons, common of pasture, common of turbary, mines, minerals, quarries, mills, mulctures, customs, tolls, duties, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, mounds, fences, hedges, ditches, freeboards, ways, waters, watercourses, fishings, fisheries, fowlings, courts-leet, courts-baron, and other courts, view of frank pledge, and all that to view of frank pledge doth belong, reliefs, heriots, fines, sums of money, amerciaments, goods and chattels of felons, and fugitive felons of themselves, outlawed persons, deodands, waifs, estrays, chief-rents, quit-rents, rents-charge, rents-seck, rents of assize, fee farm rents, boons, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever, to the said undivided moiety, or equal half part or share, rectories and advowsons, hereditaments and premises, belonging, or in any wise appertaining, or with the same or any of them respectively, now at any time heretofore demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them, or appurtenant thereto, with

appoint that the hereditaments

their and every of their appurtenances; and the reversion and reversions, remainder and remainders yearly, and other rents, issues, and profits, of all and singular the said undivided moiety, or equal half part or share, rectories and advowsons, hereditaments, and premises hereinbefore appointed, or expressed and intended so to be, shall henceforth go, remain, and be to the uses, upon and for the trusts, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed or declared, and contained of and concerning the same (that is to say), TO THE USE, INTENT, AND PURPOSE, that the said *E F* and *G F*, their heirs and assigns, shall and may, from and immediately after the decease of the said *A B*, if the said *C B* shall then be living, and thenceforth for and during the natural life of the said *C B*, yearly have, receive, and take (and he said *H B*, by force of his interest, doth for himself, his heirs, and assigns, grant and confirm unto them in the event and during the time aforesaid), one annual sum or yearly rent-charge of £500, of lawful money of *Great Britain*, to be yearly issuing, growing, and payable out of and charged and chargeable upon all and singular the said undivided moiety or equal half part or share, rectories and advowsons, hereditaments and premises, hereinbefore appointed or intended so to be, and upon and out of their rights, members and appurtenances, and to be paid to the said *E F* and *G F*, their heirs or assigns, in the common dining-hall of Lincoln's Inn, in the county of Middlesex, by four even and equal quarterly payments on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th day of *December*, in every year, without any deduction or abatement whatsoever, out of the same or any part thereof, for or in respect of any taxes, charges, rates, assessments, or impositions whatsoever, either already taxed, charged, assessed, or imposed, or hereafter to be taxed, charged, assessed, or imposed, on the said manors or lordships, towns, messuages, lands, tenements, rectories, advowsons, hereditaments, and premises, or any of them, or any part thereof, or on the said annual sum or yearly rent-charge of £500, or any part thereof, or on the said *E F* or *G F*, their heirs, or assigns, or on the said *C B*, or her assigns, or on any other person or persons, for or in respect of the same, by authority of parliament or other-

Deed of separation.

shall remain,

to the use and intent that the wife's brothers shall, after the father's death, if wife be then living,

receive during her life, a rent charge, to be charged upon the appointed hereditaments,

to be paid quarterly,

without any deduction.

Deed of separation.

wise howsoever, or for or in respect of any other matter, cause, or thing whatsoever (save and except the property tax), the first quarterly payment of the said annual sum or yearly rent-charge of £500, to be made on such of the said days of payment as shall happen next after the decease of the said *A B*, in the lifetime of the said *C B*: AND to and for this further use, intent, and purpose, that if the said annuity or yearly rent-charge of £500, or any part thereof, shall be in arrear and unpaid for the space of twenty-one days next after any of the said days or times whereon the said annuity or yearly rent-charge of £500 ought to be paid as aforesaid, then and so often as it shall so happen, it shall and may be lawful to and for the said *E F* and *G F*, their heirs and assigns (and he the said *H B*, by force of his interest, doth give and grant unto them full power and authority) to enter into and distrain upon all or any part of the said hereditaments and premises, hereby charged with the said annuity or yearly rent-charge of £500, and to sell and dispose of the distress and distresses then and there taken, or otherwise to demean therein according to law in like manner as in the case of distresses taken for rent reserved by lease or common demise; TO THE END AND INTENT, that they the said *E F* and *G F*, their heirs and assigns, may be fully paid and satisfied the said annuity or yearly rent-charge of £500, and every part thereof so in arrear and unpaid as aforesaid, and all costs, charges, and expenses occasioned by the nonpayment of the same: AND ALSO, that in case the said annuity or yearly rent-charge of £500, or any part thereof, shall at any time or times hereafter be in arrear, and unpaid for the space of thirty-one days next after any of the days or times whereon the same ought to be paid as aforesaid, then and from time to time as often as it shall so happen, it shall be lawful to and for the said *E F* and *G F*, their heirs and assigns, to enter into and upon, and to hold all and singular the hereditaments and premises hereby charged with the payment of the said annuity or yearly rent charge of £500, or any part thereof, and to receive and take the rents, issues, and profits thereof, to and for their own use until they shall therewith and thereby or otherwise be fully paid and satisfied the arrears of the said annuity or yearly rent-charge of £500 and every part thereof, due at the time of such entry, and which shall after-

Powers of distress and entry for enforcing payment of rent-charge when in arrear.

wards accrue or become due during their being in possession of the same premises, together with all such costs, charges, damages, and expenses whatsoever, as they shall sustain by reason of the non-payment thereof, and such possession when taken to be without impeachment of waste: AND FURTHER, that subject, and charged, and chargeable to and with the said annuity or yearly sum of £500, and the powers and remedies hereinbefore provided for securing and enforcing the payment thereof, all the said undivided moiety or equal half part or share, rectories, advowsons, hereditaments, and all and singular other the premises hereinbefore appointed or intended so to be, with their rights, members, and appurtenances, shall go, remain, and be to the use of the said *I K* and *L M*, their executors, administrators, and assigns, for and during, and unto the full end and term of 200 years, to be computed from the day next before the day of the decease of the said *A B*, and thenceforth next ensuing, and fully to be complete and ended, without impeachment of manner of waste, upon the trusts nevertheless, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations, hereinafter expressed, or declared and contained of or concerning the same (that is to say), UPON TRUST, that they the said *I K* and *L M*, and the survivor of them, and the executors, administrators, and assigns, of such survivor, do and shall permit the person or persons for the time being entitled to the said hereditaments in remainder, immediately expectant upon the said term, to receive and take the rents, issues, and profits, of the said hereditaments and premises, until the said annuity, yearly rent, or sum of £500, or some part thereof, shall be in arrear or unpaid by the space of forty days next after the same ought to be paid as aforesaid; and when, and so often as the said annuity or yearly sum of £500, or any part thereof, shall be in arrear or unpaid by the space of forty days next after the same shall become payable, do and shall, by and out of the rents, issues, and profits, of the said hereditaments and premises, or by demising, leasing, mortgaging, or absolutely selling the same hereditaments and premises respectively, or any part thereof respectively, for all or any part of the same term of 200 years, or by bringing any action or actions against the

Deed of separation.

And subject thereto,

that the hereditaments shall remain to the use of trustees for a term of 200 years,

upon trust,

if annuity shall be in arrear by forty days,

to raise the same out of the demised premises,

Deed of separation.

tenants or occupiers of the same hereditaments and premises, for recovering the rents, issues, and profits thereof, or of any part or parts thereof, or by all the ways and means aforesaid, or by such other ways and means as to them or him shall seem meet, levy and raise such sum and sums of money as will be sufficient, or as they shall think it expedient or proper to raise, for paying and satisfying unto the said *E F* and *G F*, their heirs or assigns, the said annuity, yearly rent, or sum of £500, or such part thereof as shall be so in arrear and unpaid, and all costs, charges, and expenses whatsoever, which they the said *E F*, *G F*, *I K*, and *L M*, or any of them, their or any of their heirs, executors, administrators, or assigns, shall or may sustain, expend, or be put unto by reason of the non-payment thereof, or otherwise in execution of the trusts of the said term of 200 years: AND do and shall pay and apply the money so to be levied or raised, or a competent part thereof, in or towards the satisfaction of the said arrears, costs, charges, and expenses accordingly, and the surplus or residue thereof (if any) unto the person or persons so for the time being intitled as aforesaid, to and for his and their own use and benefit: AND it is hereby agreed and declared, between and by the parties to these presents, that the said *E F* and *G F*, their heirs, executors, administrators, and assigns, shall stand seised and possessed of, and interested in the said annual sum or yearly rent-charge of £500, UPON TRUST, that they the said *E F* and *G F*, their heirs and assigns, do and shall from time to time, as and when the said annuity shall be received, pay the same to such person or persons only, and for such intents and purposes only as the said *C B*, notwithstanding her coverture, and as if she was sole and unmarried, and whether covert or sole, shall from time to time by any writing or writings signed by her with her own hand, but not so as to dispose of or affect the same by any sale, mortgage, or charge, or otherwise, in the way of *anticipation*, direct or appoint; AND in default of such direction or appointment, into the proper hands of her the said *C B*, for her sole and separate use, exclusively of the said *H B*, who is not to intermeddle therewith, nor is the same to be subject to his control, debts, contracts, forfeitures, disposals or engagements, and the receipts and discharges of the said *C B*, and of such

and all costs, &c.

The annuity to be paid to such person as wife, by any writing under her hand, shall appoint, but not in the way of anticipation.

And in default of appointment, into wife's proper hands for her separate use.

The receipts of wife or of

person or persons as she shall from time to time direct or appoint to receive all or any part of the said annual sum of £500 shall be, notwithstanding her coverture, effectual discharges to the person or persons paying the same for the money therein expressed or acknowledged to be received: PROVIDED ALWAYS that when the trusts hereinbefore declared of the said term of 200 years shall have been performed, or have become unnecessary, or incapable of taking effect, and all costs and charges occasioned by the trusts of the said term of 200 years shall be paid (and which costs and charges the said *I K* and *L M*, and the survivor of them, and the executors, administrators, or assigns of such survivor, are and is hereby authorised to levy and raise by the ways and means aforesaid or any of them) then and immediately thereupon the said term of 200 years shall (subject and without prejudice to any sale or mortgage or other disposition which shall have been made in pursuance of the trusts aforesaid) cease, determine and become utterly void to all intents and purposes whatsoever: PROVIDED ALWAYS, and it is hereby declared that the provision hereinbefore, and by the said bond of even date herewith made for the said *C B* shall be, and she doth hereby accept the same in lieu of all dower and freebench to which at the common law by custom or otherwise she may, or otherwise might be intitled, out of any lands of which the said *H B* hath been, or is, or during the said coverture, may be seised: AND THIS INDENTURE ALSO WITNESSETH, that in pursuance and further performance of the said agreement on the part of the said *H B*, he the said *H B* doth for himself, his heirs, executors, and administrators covenant, promise, and agree with and to the said *E F* and *G F*, their heirs and assigns respectively, by these presents, that he the said *H B*, his heirs, executors, or administrators shall and will after the decease of the said *A B*, if the said *C B* shall survive him, from time to time, and at all times thereafter during the life of the said *C B*, well and truly pay or cause to be paid unto the said *E F* and *G F*, their heirs and assigns, the said annuity or yearly sum of £500, so granted and secured respectively to them as aforesaid, in trust and for the benefit of the said *C B*, as hereinbefore is mentioned, in the parts, shares, and proportions, and on or at the days or times

Deed of separation.

her appointees to be sufficient discharges.

Proviso that when the trusts of the term are performed the term shall cease.

Agreement that wife accepts the provision in bar of dower.

Covenant by husband for payment of the annuity.

Deed of separation.

hereinbefore appointed for the payment thereof, without any deduction or abatement whatsoever (except as aforesaid) and according to the true intent and meaning of these presents: AND the said *A B* and *H B* do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators covenant, promise, and agree with and to the said *E F* and *G F*, their heirs and assigns, so far as relates to the right to appoint and charge the said annuity of £500, quiet enjoyment, freedom from incumbrances, and further assurance of the same, and (as a separate covenant) with and to the said *I K* and *L M*, their executors, administrators, and assigns, so far as relates to the right to appoint, quiet enjoyment, freedom from all incumbrances, and further assurance of the said term of 200 years by these presents, in manner following, (that is to say) that they, the said *A B* and *H B* now have in themselves respectively good right, full power, and lawful and absolute authority to limit, appoint, and charge the said annuity, yearly rent, or sum of £500, and the said powers and remedies for recovering and compelling payment thereof as aforesaid, upon all and singular the said hereditaments and premises hereinbefore mentioned; and also to limit, appoint, and assure the said hereditaments and premises unto the said *I K* and *L M*, their executors, administrators, and assigns for and during the said term of 200 years in manner aforesaid, and according to the true intent and meaning of these presents: AND that all and singular the hereditaments and premises shall continue and be charged with and subject to the said annuity, yearly rent, or sum of £500, and subject and liable to the distress or distresses, entry and entries of the said *E F* and *G F*, their heirs and assigns, for the recovery of the same, and for all costs, charges, and expenses to be occasioned by the nonpayment thereof, and shall or may be held, possessed, occupied, and enjoyed by the said *I K* and *L M*, their executors, administrators, and assigns for the said term of 200 years in manner aforesaid, and according to the true intent and meaning of these presents: AND that respectively free and clear or freely and clearly and absolutely exonerated and for ever discharged, or otherwise by the said *A B* and *H B*, their heirs, executors, or administrators, or some or

Covenants by the father and husband.

That they have good right to limit, appoint, and charge the annuity and the powers, and remedies for recovery thereof upon the hereditaments.

And to limit the same for the term of 200 years.

And that the hereditaments shall continue charged with the rent charge.

Liable to the power of distress and entry.

Free from incumbrances.

one of them, well and sufficiently saved, defended, kept harmless and indemnified of, from, and against all charges and incumbrances whatsoever: AND FURTHER that they the said *A B* and *H B* and their respective heirs, and all and every the person and persons whomsoever, having or claiming or who shall or may at any time or times hereafter have or claim any estate, right, title, or interest, legal or equitable, in, to, or out of the said hereditaments and premises hereby charged and limited and appointed as aforesaid, shall and will at any time or times hereafter, upon every reasonable request of the said *E F* and *G F*, their heirs or assigns, but at the proper costs and charges of the said *A B* and *H B*, their heirs, executors, or administrators, make, do and execute, or cause and procure to be made, done and executed, all and every such further and other lawful and reasonable acts, deeds, matters and things whatsoever, for the further, better and more effectually charging the said manors, messuages, tenements, hereditaments and premises, with the said annuity, yearly rent, or sum of £500, and with such powers and remedies for recovering and enforcing payment thereof as aforesaid: AND ALSO for the further, better and more effectually limiting, appointing, conveying and assigning the said manors, hereditaments and premises unto the said *I K* and *L M*, their executors, administrators, and assigns for the residue which shall be then to come and unexpired of the said term of 200 years, according to the true intent and meaning of these presents, as by the said *E F* and *G F*, their heirs or assigns, or any of the parties interested in the premises, or their or any of their counsel in the law shall be reasonably advised or devised and required: AND THIS INDENTURE LASTLY WITNESSETH that in pursuance and performance of the aforesaid agreement in this behalf, and in consideration of the premises, they the said *E F* and *G F* do hereby for themselves jointly and severally, and for their several and respective heirs, executors and administrators, covenant, promise and agree with and to the said *H B*, his heirs, executors, and administrators in manner following (that is to say) THAT she the said *C B*, her executors, administrators and assigns, shall and will from time to time, and at all times hereafter well and sufficiently save, defend, keep harmless, and indemnified the said *H B*, his heirs,

Deed of separation.

And for further assurance.

Covenant by wife's trustees to indemnify husband against her debts.

Deed of separation.

executors and administrators, and his and their lands and tenements, goods and chattels, of, from or against the debt or debts, sum or sums of money which the said *C B* hath already contracted, or shall or may at any time or times hereafter during the said separation contract with any person or persons whomsoever, and every part thereof; AND of, from and against all such costs, charges, damages and expenses as shall or may be recovered against or be sustained or expended or become payable by him, them or any of them, on account or in respect thereof, or by reason of any act or default already committed, done or suffered by the said *C B*. IN WITNESS, &c.

No. XX.

Deed of Separation between Husband and Wife (a).

THIS INDENTURE made the day of in the year of our Lord 1818, BETWEEN *A B* of of the first part, *C B* of (the wife of the said *A B*, but now living separate and apart from him, with *E F* of her brother) of the second part, and the said *E F* of the third part: WHEREAS unhappy differences have arisen and do still subsist between the said *A B* and *C B*, and by reason of the same they have agreed to live separate and apart from each other, and the said *A B* hath agreed to allow and pay the said *C B* one annuity or clear yearly sum of £80, as and for her separate maintenance and support during the joint lives of herself and the said *A B*, (subject nevertheless to the proviso hereinafter contained), and the said *E F* hath agreed to enter into the covenant hereinafter contained: NOW THIS INDENTURE WITNESSETH that in pursuance and performance of the said agreement in this behalf he the said *A B* doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said *E F*, his heirs, executors, and administrators in manner following, (that is to say), THAT the said *C B* may from time to time and at all times hereafter, live separate and apart from the said *A B*, her husband, as if she were sole and unmarried: AND THAT she shall be free from the power and command, restraint, control, authority, and government of him the said *A B*, and shall and may live and reside in such place or places and in such manner as to her shall from time to time seem meet: AND THAT he the said *A B* shall not nor will molest or disturb the said *C B* in her person, or in her manner of living, nor at any time or times hereafter require, or by any means whatsoever, either by ecclesiastical censure, or by taking out citation or

Parties.

Recites that husband and wife have agreed to live separate.

Husband covenants with wife's brother,

that the wife may live separate,

free from his control,

(a) See the precedent of a more special deed of separation, ante No. 19.

Deed of separation.

process, or by commencing or instituting any suit whatsoever, seek or endeavour to compel her the said *C B* to cohabit or live with him the said *A B*, or to compel any restitution of conjugal rights, nor shall or will for that purpose or otherwise use any force, violence, or restraint to the person of the said *C B*, or sue or cause to be sued any person or persons whomsoever for receiving, harbouring, lodging, protecting, or entertaining her: but that she the said *C B* may in all things live as if she were sole and unmarried, without the restraint or correction of the said *A B*, or of any other person or persons by or through his means, consent, or procurement: AND FURTHER that he the said *A B* shall and will yearly and every year during the joint lives of him the said *A B* and *C B* well and truly pay or cause to be paid into the proper hands of the said *C B*, to and for her own sole and separate use and benefit, or to such person or persons as she, in writing, signed with her proper hand, shall from time to time, notwithstanding her coverture, direct or appoint, one clear annuity or yearly sum of £80 by four even and equal quarterly payments, on the 25th day of *March*, the 24th day of *June*, the 29th day of *September*, and the 25th day of *December*, in every year, without any abatement or deduction whatsoever, the first payment thereof to begin and be made on the 25th day of *March* now next ensuing: AND THAT it shall and may be lawful to and for the said *C B* by her will, or any codicil or codicils thereto, or by any writing in the nature of a will, codicil, or codicils to dispose of all savings of the said annuity in such manner as she shall think proper: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, and to be the true intent and meaning of these presents, that so long as the said *C B* shall live and reside with the said *E F*, the said annuity or yearly sum of £80 shall be paid to the said *E F* at the times and in manner aforesaid, in trust for the said *C B*, and that the receipt of the said *E F*, signed with his own proper hand, shall be a good and sufficient discharge for so much of the said annuity or yearly sum of £80 as shall be therein acknowledged or expressed to be received; and the said *E F* shall not nor will be answerable for any misapplication thereof: AND THIS INDENTURE ALSO WITNESSETH that for and in considera-

and that he will not molest her nor require her to cohabit with him.

That he will pay an annuity to the wife or her order,

and that she may by will or otherwise dispose of the savings.

Proviso, that so long as wife resides with her brother the annuity shall be paid to him in trust for her,

and that the receipt of the brother shall be a good discharge.

Deed of separation.

tion of the covenants and agreements hereinbefore contained on the part and behalf of the said *A B*, AND ALSO for and in consideration of the sum of £20 of lawful money of *Great Britain*, by the said *A B* to the said *E F*, in hand well and truly paid at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) he the said *E F*, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said *A B*, his executors and administrators, by these presents in manner following, (that is to say), that the said *C B* shall not at any time hereafter molest or disturb the said *A B*, or require or by any means whatsoever, either by ecclesiastical censure or by taking out any citation or process, or by commencing or instituting any suit whatsoever, or in any other manner endeavour to compel him the said *A B* to cohabit or live with her, or to compel any restitution of conjugal rights, nor seek for or require, or by any means whatsoever endeavour to compel the said *A B* to allow her more, or any further or greater, or other alimony or maintenance than the said clear annuity or yearly sum of £80: AND FURTHER that he the said *E F*, his heirs, executors, or administrators, shall and will from time to time and at all times hereafter well and sufficiently save, defend, keep harmless, and indemnified the said *A B*, his heirs, executors, and administrators, and his and their real and personal estates, of, from, and against all and every the debt and debts which the said *C B* already hath contracted, or shall or may at any time or times hereafter during the said separation contract with any person or persons whomsoever, and every part thereof, and of and from all actions, suits, claims, and demands whatsoever, on account thereof, and of, from, and against all such costs, charges, losses, damages, and expenses as shall or may be recovered against, or sustained, expended, or become payable by him, them, or any of them on account or in respect thereof, or by reason of any act or default already committed, done, or suffered by the said *C B*: PROVIDED ALWAYS, and it is hereby agreed and declared to be the true intent and meaning of these presents, and of the said parties, that in case the said *A B* and *C B* shall at any time hereafter with their mutual consent come together and cohabit as man

Wife's brother covenants with husband,

that he will not require husband to live with her nor to allow her more than the said annuity,

and will indemnify husband against wife's debts,

and from all actions.

Proviso that if husband and wife shall hereafter consent to live together the annuity shall cease and the covenants be void.

Deed of separation.

and wife, that then and in such case and from thenceforth the said annuity or yearly sum of £80, hereinbefore covenanted and agreed to be paid, shall cease and be no longer payable, and from thenceforth all the covenants and agreements hereinbefore contained, on the part and behalf of the said *E F*, shall become absolutely null and void to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. IN WITNESS, &c.

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